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Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-second session (New York, 2-6 February 2015)

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I. Introduction

1. At its thirty-sixth session, in 2003, the Commission heard proposals that a revision of the UNCITRAL Notes on Organizing Arbitral Proceedings (1996)[1] (the "Notes") could be considered as a topic of future work.[2] At its forty-fifth session, in 2012, the Commission recalled the agreement at its forty-fourth session,[3] in 2011, that the Notes ought to be updated pursuant to the adoption of the UNCITRAL Arbitration Rules, as revised in 2010.[4] At its forty-sixth session, in 2013, the Commission reiterated that the Notes required updating as a matter of priority. It was agreed at that session that the preferred forum for that work would be that of a Working Group, to ensure that the universal acceptability of those Notes would be preserved. It was recommended that a single session of the Working Group should be devoted to consideration of the Notes and that such consideration should take place as the next topic of future work, after completion of the preparation of a convention on transparency in treaty-based investor-State arbitration.[5] At its forty-seventh session, in 2014, the Commission agreed that the Working Group should consider at its sixty-first and, if necessary, its sixty-second sessions, the revision of the Notes, and in so doing, the Working Group should focus on matters of substance, leaving drafting to the Secretariat.[6]

2. At its forty-seventh session, the Commission further agreed that, in addition to the revision of the Notes, the Working Group should consider at its sixty-second session the issue of enforcement of international settlement agreements resulting from conciliation proceedings and should report to the Commission, at its forty-eighth session, in 2015, on the feasibility and possible form of work in that area.[7] The Commission invited delegations to provide information to the Secretariat in respect of that subject matter.[8]

3. At its forty-seventh session, the Commission also recalled that it had identified, at its forty-sixth session, in 2013,[9] that the subject of concurrent proceedings was increasingly important particularly in the field of investment arbitration and might warrant further consideration. In relation to that item, the Commission agreed that the Secretariat should explore the matter further, in close cooperation with experts from other organizations working actively in that area. The Commission requested the Secretariat to report to the Commission, at a future session, outlining the issues at stake and identifying work that UNCITRAL might usefully undertake in the area.[10]

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[1] *UNCITRAL Yearbook*, vol. XXVII: 1996, part three, annex II.

[2] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 204.

[3] Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 205 and 207.

[4] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 70.

[5] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 130.

[6] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 122 and 128.

[7] A proposal for future work in relation to enforcement of international settlement agreements considered by the Commission at its forty-seventh session is contained in document A/CN.9/822.

[8] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 123 to 125 and 129.

[9] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 131 and 132.

[10] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), paras. 126, 127 and 130.

II. Organization of the session

4. The Working Group, which was composed of all States members of the Commission, held its sixty-second session in New York, from 2-6 February 2015. The session was attended by the following States members of the Working Group: Algeria, Argentina, Armenia, Australia, Austria, Belarus, Brazil, Bulgaria, Canada, China, Colombia, Croatia, Denmark, France, Georgia, Germany, Greece, India, Indonesia, Italy, Japan, Kuwait, Mexico, Pakistan, Panama, Paraguay, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Switzerland, Thailand, Turkey, United States of America and Venezuela (Bolivarian Republic of).

5. The session was attended by observers from the following States: Chile, Cyprus, Czech Republic, Democratic Republic of the Congo, Finland, Guatemala, Libya, Netherlands, Norway, Portugal, Romania, Somalia, South Africa, Sweden and Viet Nam.

6. The session was also attended by observers from the Holy See and the European Union.

7. The session was also attended by observers from the following international organizations:

(a) *United Nations System*: World Intellectual Property Organization (WIPO);

(b) *Intergovernmental organizations*: International Cotton Advisory Committee (ICAC) and Permanent Court of Arbitration (PCA);

(c) *Invited non-governmental organizations*: American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), American Society of International Law (ASIL), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Asociacion Americana de Derecho Internacional Privado (ASADIP), Association Suisse de l'Arbitrage (ASA), Belgian Center for Arbitration and Mediation (CEPANI), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Centre for International Environmental Law (CIEL), Chartered Institute of Arbitrators (CIARB), CISG Advisory Council (CISG-AC), Construction Industry Arbitration Council (CIAC), Corporate Counsel International Arbitration Group (CCIAG), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), Institute of International Commercial Law (IICL), Inter-American Commercial Arbitration Commission (IACAC), International Arbitration Institute (IAI), Inter-Pacific Bar Association (IPBA), International Bar Association (IBA), International Chamber of Commerce (ICC), International Council for Commercial Arbitration (ICCA), International Insolvency Institute (III), International Institute for Conflict Prevention and Resolution (CPR), International Law Institute (ILI), International Mediation Institute (IMI), London Court of International Arbitration (LCIA), Madrid Court of Arbitration, Miami International Arbitration Society (MIAS), Milan Club of Arbitrators (MCA), Moot Alumni Association (MAA), New York International Arbitration Center (NYIAC), New York State Bar Association (NYSBA), P.R.I.M.E. Finance Foundation (PRIME), Queen Mary University of London School of International Arbitration (QMUL), Regional Centre for

International Commercial Arbitration — Lagos (RCICAL) and Swedish Arbitration Association (SAA).

8. The Working Group elected the following officers:

Chairman: Mr. Michael E. Schneider (Switzerland)
Rapporteur: Mr. Prem K. Malhotra (India)

9. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.185); (b) notes by the Secretariat regarding the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings (A/CN.9/WG.II/WP.186) and regarding enforceability of settlement agreements resulting from international commercial conciliation/mediation (A/CN.9/WG.II/WP.187 and A/CN.9/WG.II/WP.188).

10. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Enforcement of settlement agreements resulting from conciliation proceedings.
5. Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings.
6. Organization of future work.
7. Adoption of the report.

III. Deliberations and decisions

11. The Working Group considered agenda item 4 and resumed its work on agenda item 5 on the basis of the notes prepared by the Secretariat (A/CN.9/WG.II/WP.186, A/CN.9/WG.II/WP.187 and A/CN.9/WG.II/WP.188). The deliberations and decisions of the Working Group with respect to items 4 and 5 are reflected in chapters IV and V, respectively.

12. At the closing of its deliberations, the Working Group requested the Secretariat to prepare a draft of revised UNCITRAL Notes on Organizing Arbitral Proceedings, based on the deliberations and decisions of the Working Group, for consideration by the Commission at its forty-eighth session, to be held in Vienna, from 29 June-16 July 2015.

IV. Enforcement of settlement agreements resulting from international commercial conciliation/mediation

A. General remarks

13. It was noted that the Commission, at its forty-seventh session, agreed that the Working Group should consider the issue of enforcement of settlement agreements

resulting from conciliation/mediation[11] based on a proposal to prepare a convention, modelled on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the "New York Convention") (see A/CN.9/822).

14. The Working Group recalled that UNCITRAL had developed two instruments aimed at harmonizing international commercial conciliation: the Conciliation Rules (1980) and the Model Law on International Commercial Conciliation (2002) (the "Model Law on Conciliation" or the "Model Law"), which formed the basis of an international framework for conciliation. The issue of enforcement of settlement agreements had been considered when preparing the Model Law on Conciliation[12] resulting in article 14 which provided as follows: "If the parties conclude an agreement settling a dispute, that settlement agreement is binding and enforceable ... [*the enacting State may insert a description of the method of enforcing settlement agreements or refer to provisions governing such enforcement*]."

15. It was generally agreed that conciliation, as a means of resolving commercial disputes, should be promoted. The benefits of conciliation were also highlighted, such as reducing the instances where a dispute would lead to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings for the parties.

16. The Working Group decided to first consider the legal and practical issues that could arise from a convention on enforcement of settlement agreements and later to assess the feasibility of preparing such a convention.

B. Legal and practical questions

Nature of the instrument to be developed

17. It was said that providing a mechanism to enforce settlement agreements would make conciliation a more efficient means for resolving commercial disputes. During the discussion, the Working Group heard the results of an empirical study on the use of conciliation, which consisted of a survey of different categories of users. The survey found that, in the view of those responding, (i) it was generally more difficult to enforce settlement agreements outside the State in which the agreements were concluded; and (ii) the lack of a harmonized enforcement mechanism was a disincentive for parties to proceed with conciliation.

18. In that context, it was said that a convention providing such a mechanism would encourage parties to consider investing resources in conciliation, by providing greater certainty that any resulting settlement agreements could be relied on and easily enforced. It was further said that such a convention would provide a clear and uniform framework for facilitating enforcement in different jurisdictions. In addition, it was mentioned that the preparation of a convention would itself encourage the use of conciliation.

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[11] The terms "conciliation" and "mediation" are used interchangeably as broad notions referring to proceedings in which a person or a panel of persons assists the parties in their attempt to reach an amicable settlement of their dispute (see article 1(3) of the Model Law on Conciliation and para. 5 of its Guide to Enactment and Use).

[12] *UNCITRAL Yearbook*, vol. XXXIII: 2002, part three, annex I.

19. However, it was underlined that preparing a convention might be a lengthy process. By way of illustration, it was said that the New York Convention, which followed the Geneva Convention on the Execution of Foreign Arbitral Awards (1927), built upon the experience gained through long years of arbitration practice. In contrast, it was said that, in some States, there was a lack of experience in international conciliation, particularly due to the diversity in conciliation processes as well as different legal traditions. It was suggested that a more gradual approach should be taken to harmonize the regime of enforcement of settlement agreements, possibly starting from the harmonization of domestic legislation.

20. It was further pointed out that article 14 of the Model Law merely stated the principle that settlement agreements were enforceable, without attempting to specify the method by which such settlement agreements might be enforced, a matter which had been left to each enacting State. It was suggested that the circumstances that led to that result had not changed since the adoption of the Model Law and that the Working Group might face similar difficulties in addressing the issue as when it prepared article 14 of the Model Law.

21. It was further questioned whether an international mechanism on enforcement might result in a more cumbersome review of settlement agreements than under current domestic mechanisms. It was pointed out that a contract could circulate without formalities or control in any State, the situation being different for a foreign judgment or an arbitral award. In that regard, it was stated that further analysis of the domestic legislation and its implementation would greatly assist the Working Group in evaluating the need for, and the feasibility of, a convention. The Working Group recalled that a questionnaire on the legislative framework on enforcement of international settlement agreements resulting from mediation had been circulated by the Secretariat. The Working Group was informed that the replies received would be available for the Commission at its forty-eighth session, in 2015. It was proposed that the Secretariat should reiterate the invitation to States to respond to the questionnaire (see above, para. 2).

22. It was questioned how an international instrument on enforcement of settlement agreements would interact with domestic legislation on conciliation. It was suggested that procedural issues addressed by the Model Law should not be reopened by a convention on enforcement of international settlement agreements. It was clarified that the envisaged convention would not address the procedural aspects dealt in domestic legislation and would only introduce a mechanism to enforce international settlement agreements.

23. It was suggested that the aim should be to provide a simple mechanism to enforce settlement agreements. It was further mentioned that flexibility of the conciliation process should be preserved. Nonetheless, the concern was expressed for the need to ensure respect for public policy of the State in which the enforcement would be sought (see also below, para. 31).

24. It was said that many multinational businesses had difficulties convincing other parties to attempt conciliation because of questions regarding the international standing of conciliation and the enforceability of resulting settlements. It was also said that there were many instances in which attempts to enforce a settlement agreement led to re-litigation on the merits.

New York Convention as a model

25. A question was raised as to whether the New York Convention would be the appropriate model for preparing a convention on enforcement of settlement agreements. In that context, the Working Group considered whether a convention should also address recognition of the agreement to submit a dispute to conciliation and the settlement agreement. It was said that the exclusive nature of the arbitration agreement (referring a dispute to arbitration) created the need for the recognition, which did not necessarily arise with respect to conciliation.

26. It was further questioned whether a convention on enforcement of settlement agreements should refer to "foreign" as opposed to "international" settlement agreements. By way of comparison, it was noted that the Model Law on International Commercial Arbitration (1985, as amended in 2006) (the "Model Law on Arbitration") referred to enforcement of awards "irrespective of the country in which [they] were made" in its article 35, while the New York Convention referred to the enforcement of "foreign" arbitral awards.

27. It was stated that one of the key questions that would need to be addressed in a convention was how to determine the notion of "international" and the relevant criteria for such determination (for example, based on a territorial approach (place where the conciliation took place or place of conclusion of the settlement agreement), a personal approach (parties' place of business) or an approach based on the law applicable to the settlement agreement). It was suggested that the notion of "settlement agreement" would also need to be determined.

28. With regard to a suggestion that the scope of a convention should be limited to international settlement agreements, concerns were raised about the potential detrimental effect of a convention that would treat international and domestic settlement agreements differently.

29. It was further stated that a settlement agreement differed quite significantly from an arbitral award and therefore, caution should be taken when making an analogy. In that context, reference was made to article 30 of the Model Law on Arbitration which provided that the arbitral tribunal should record the settlement in the form of an arbitral award on agreed terms, if requested by the parties and on the condition that the arbitral tribunal itself had no objections (see below, para. 39).

30. It was mentioned that the introduction of an enforcement mechanism for settlement agreements could blur the distinction that currently existed between arbitration and conciliation by adding more formal requirements to conciliation.

31. It was questioned whether a procedure similar to that of article V of the New York Convention could be envisaged for a convention providing grounds to refuse enforcement. It was further stressed that the public policy of the State in which the enforcement would be sought could constitute a ground for refusing enforcement (see above, para. 23).

Other international instruments

32. While a point was made that the Convention on the Choice of Court Agreements (2005) prepared by the Hague Conference on Private International Law (the "Hague Conference") could shed some light on the project (particularly, article 12), it was generally felt that the scope of that Convention was quite distinct

from the issue at hand. It was further mentioned that the Secretariat had been in communication with the Permanent Bureau of the Hague Conference on the proposed project for a convention on enforcement of settlement agreements and it had been identified that the work by the Hague Conference on the enforcement of mediated agreements in the context of international family contracts might raise similar issues with respect to the proposed convention.

Settlement agreement to be enforced

33. It was stated that very few settlement agreements required enforcement as most parties would abide by the terms of the settlement agreement.

34. It was said that the type of obligations stipulated in a settlement agreement might be broad. Elements of complexities pertaining to settlement agreements were mentioned, such as reciprocal obligations, or conditions for the implementation of obligations that would render enforcement more complex. It was also stated that settlement agreements usually contained dispute settlement clauses to resolve disputes arising from the agreement.

35. A view was expressed that the contractual nature of the settlement agreement should be preserved. Concerns were raised that treatment of settlement agreements as distinct from an ordinary contract could distort the law of contracts. In response, it was argued that while a settlement agreement was contractual in nature, it might deserve a different treatment as it was the result of a procedure to resolve a dispute.

36. It was suggested that a convention should not deprive the parties of the contractual remedies provided under the applicable contract law.

37. A question was raised as to whether any regime that would be created by a convention on enforcement of settlement agreements would be optional in nature and would allow the parties to either opt-in or out of that regime. It was said that a convention should take into consideration the need to respect party autonomy and for instance, consent would be required to make any settlement agreement directly enforceable. It was suggested that in order to both simplify enforcement and provide a mechanism that would take account of party autonomy in relation to enforcement of settlement agreements, it should suffice that the parties expressly confirmed in the settlement agreement itself that they intended to make such agreement subject to enforcement under the convention.

38. A question raised concerned the interrelationship between a contractual claim based on the breach of a settlement agreement and the enforcement of the settlement agreement itself.

39. It was highlighted that some domestic legislation treated a settlement agreement in a manner similar to an arbitral award for the purpose of enforcement. It was further noted that some legislation permitted a settlement agreement to be recorded as an arbitral award on agreed terms ("consent award") when certain conditions were met (see above, para. 29). In that context, arbitration institutions were invited to provide information on the number of consent awards rendered, so as to provide an indication of the significance of such practice.

40. Concerns were raised about specific issues pertaining to the enforcement of settlement agreements that included non-monetary aspects, in light of the fact that certain domestic legislation imposed restrictions on such non-monetary obligations.

41. In response, it was argued that the scope of a convention should cover all types of settlement agreements, without limitations as to the remedies or nature of obligations that would be provided under those agreements. It was also pointed out that in many States, there were existing instruments to enforce monetary obligations (for example, through the issuance of a bill of exchange or a promissory note). It was pointed out that the New York Convention applied to monetary as well as non-monetary obligations resulting from an award.

42. It was also argued that the scope of a convention could cover not only settlement agreements resulting from conciliation but also those resulting from mere negotiation between the parties.

43. It was suggested that settlement agreement involving consumers might be excluded from the scope of the convention.

Validity of the settlement agreement

44. A question was raised as to whether a court enforcing a settlement agreement under the proposed convention would have jurisdiction to also consider the validity of that agreement.

C. Feasibility and possible form of future work

45. The Working Group then discussed the various solutions to address the enforcement of settlement agreements. In doing so, it was suggested that any recommendation to the Commission as to possible work in the area should be made when there was reasonable expectation that the issues identified could be resolved.

Domestic legal framework

46. A question was raised as to whether States had adopted domestic legislation to address the issue of enforcement of settlement agreements, as contemplated by article 14 of the Model Law. It was suggested that if States had not yet adopted such legislation, it would be preferable to first concentrate on promoting the development of domestic legislative frameworks and work on an international instrument at a later stage.

47. In response, the Working Group was informed that a number of States had adopted legislation to provide for enforcement of settlement agreements (see document A/CN.9/WG.II/WP.187, paras. 21 to 30). During the discussion, the following information was provided to the Working Group.

48. Some States had no specific legislation on enforcement of settlement agreements, with the result that contract law would apply. However, it was noted that despite the absence of legislation, courts in a jurisdiction adopted an expedited and streamlined process for the enforcement of domestic settlement agreements. Other States had legislation providing for enforcement of settlement agreements as court judgements, where the agreement was approved by a court. Some States permitted enforcement of settlement agreements through summary proceedings, provided that the agreement was signed by the mediator or by the parties and that the agreement contained a statement expressing the parties' intent to seek summary enforcement. Other States required deposition or registration of the agreement at a

court for it to be enforceable. The practice of requiring a notary public to notarize the settlement agreement or establishing a public deed was adopted by some States. Other States had legislation which permitted parties who have settled a dispute to appoint an arbitral tribunal for the specific purpose of issuing a consent award based on the agreement of the parties. It was also highlighted that certain States provided for more than one measures mentioned above to enforce settlement agreements.

49. It was noted that those developments in domestic legislation since the adoption of the Model Law on Conciliation were an indication that States were giving importance to the matter, and that it might be timely to consider future work in the area.

Enforcement of the settlement agreement or of an instrument giving force to the settlement agreement

50. It was questioned whether a convention should make settlement agreements directly enforceable or whether it should incorporate a control mechanism. For instance, it was questioned whether a settlement agreement would need to be authenticated to benefit from any enforcement procedure and, if so, the competent authority (the conciliator, an institution or a court) and the procedure of obtaining authentication would need to be further addressed.

51. It was suggested that a convention on enforcement of settlement agreements could either provide for the enforcement of the agreement itself, or for the enforcement of an instrument that would be issued by a competent authority.

52. It was mentioned that the advantage of the first option was that it provided for a simple and straightforward solution. However, it was said that some formal requirements would need to be met in order for an agreement to be enforceable in another State (for example, the obligation stipulated in the agreement should be capable of being enforced in that State and the conciliation procedure complied with due process). It was pointed out that a convention should set out the minimum requirement that a settlement agreement would need to meet to be enforceable.

53. In that light, it was said that the second option would give international legal effect to domestic enforcement procedures, thereby streamlining the cross-border enforcement procedure, although requiring formal actions in several jurisdictions. It was mentioned that under that option, the court where enforcement would be sought would undertake limited review of the settlement agreement.

54. However, it was pointed out that a number of questions would need to be addressed under that option such as which jurisdiction would be competent to review the settlement agreement in the first place for it to be enforced abroad and whether a minimum standard should be established to give international effect to domestic enforcement procedures. In addition, it was suggested that for those States that gave effect to a settlement agreement in the form of a judgement, the recognition and enforcement could take place under the law governing the recognition and enforcement of foreign judgements, and would not fall under the scope of a convention on enforcement of settlement agreements. Similarly, if a settlement agreement had been notarized for the purpose of enforcement, cross-border enforcement might then proceed on the basis of existing multilateral or bilateral conventions.

55. It was suggested that a convention on enforcement of settlement agreements could include a combination of the two options mentioned above (see above, para. 51). It was also mentioned that if a convention were to be prepared, it should provide States some flexibility to make declarations or reservations.

Other possible forms of work

56. Views were expressed that there was not sufficient information to embark on the preparation of a convention. It was suggested that guidelines or model provisions could be developed to assist States, as it would preserve the flexibility of conciliation. It was further said that not all States had developed legislation to address enforcement of settlement agreement and that the preparation of a convention was premature. Therefore, it was suggested that a cautious approach should be adopted.

D. Recommendation to the Commission

57. The Working Group recalled the request by the Commission to consider the issue of enforcement of settlement agreements resulting from international commercial conciliation proceedings and to report on the feasibility and possible form of work in that area (see above, para. 2). The Working Group further recalled that when UNCITRAL prepared the Model Law on Conciliation, the Commission was generally in agreement with the policy that easy and fast enforcement of settlement agreements should be promoted (see para. 88 of the UNCITRAL Guide to Enactment and Use of the Model Law).

58. Questions and concerns were expressed during the deliberation, but it was generally felt that they could be addressed through further work on the topic.

59. After discussion, the Working Group agreed to suggest to the Commission that it be given a mandate to work on the topic of enforcement of settlement agreements, to identify the relevant issues and develop possible solutions, including the preparation of a convention, model provisions or guidance texts. Considering that differing views were expressed as to the form and content, as well as the feasibility, of any particular instrument, it was also agreed to suggest that a mandate on the topic be broad enough to take into account the various approaches and concerns.

V. Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings

60. The Working Group commenced its consideration of the draft revised UNCITRAL Notes on Organizing Arbitral Proceedings (the "draft revised Notes") as contained in paragraph 6 of document A/CN.9/WG.II/WP.186. The Working Group noted that the draft revised Notes had been prepared to update the Notes reflecting the decisions of the Working Group at its sixty-first session (see A/CN.9/826).

A. Introduction

61. In relation to paragraph 1 of the draft revised Notes, it was agreed that the word "application" in the second sentence was not appropriate as the Notes were intended to be an instrument for use by arbitration practitioners and not an instrument that would regulate arbitral proceedings.

62. It was agreed that the last sentence of paragraph 3 of the draft revised Notes, which indicated the appropriate time when the arbitral tribunal should bring matters to the attention of the parties, should be revised along the following lines: "..., it is be advisable not to raise a matter prematurely, i.e. before it is clear that the issue need to be addressed".

63. In relation to paragraph 6 of the draft revised Notes, it was suggested that the words "laws governing the arbitral procedure" should be replaced by the words "applicable arbitration laws" or "laws applicable to arbitration" as the reference to laws governing arbitral procedure was too limited. The Working Group agreed that similar revisions should be made throughout the draft revised Notes. While noting the need to stress the "fair" and "efficient" nature of the arbitration process, it was suggested that repeating those words in paragraph 6 should be avoided.

64. It was agreed that the first sentence of paragraph 7 of the draft revised Notes should be recast to better reflect the hierarchy of norms that might limit the discretion of the arbitral tribunal, with the applicable arbitration law listed first.

65. It was suggested that the draft revised Notes should address the need for the arbitral tribunal to draw the attention of the parties to the wide range of laws that might be applicable during the course of the arbitral proceedings. While there was general support for that suggestion, the need for the arbitral tribunal to remain impartial in drawing the attention of the parties to that matter was stressed.

66. In relation to paragraph 8 of the draft revised Notes, the Working Group agreed that the usefulness of preparing a procedural timetable could be mentioned. In that context, it was further agreed that references could be made to the procedural arrangements agreed by the parties and the arbitral tribunal.

67. In relation to paragraph 9 of the draft revised Notes, it was agreed that the words "pre-hearing review" could be deleted as that term was not commonly used. While a suggestion was made that the words "preliminary meeting" could also be deleted, it was agreed that they should be retained as a generic term to be used jointly with the term "case management conference". It was further agreed that the draft revised Notes should make consistent use of those terms. The Working Group also agreed that the usefulness of having the parties' representatives present at those meetings should be highlighted.

68. It was further agreed that paragraph 9 should clarify that in the event of non-participation of a party to those meetings, the procedural timetable should provide the non-participating party with the opportunity to present its case in the arbitral proceedings.

69. It was agreed that paragraph 10 of the draft revised Notes should be expanded to address the possible forms that "decisions" could take (for example, a procedural order), while underlining the significance of those decisions irrespective of their

form. It was also agreed that that paragraph should clarify that decisions could be made not only during but also after the case management conference. The possibility of an oral decision being recorded at a later stage was also mentioned. A suggestion was made that the period in which the procedural arrangement (or "decision") could be revisited should be qualified as the word "later" was too broad.

70. The Working Group also agreed that a sentence along the following lines should be added in paragraph 10: "When modifying procedural arrangements, the arbitral tribunal and the parties may have to take into consideration dispositions which the parties have taken in compliance with those arrangements and avoid creating any unfairness by making such modification".

71. In that context, it was suggested that the draft revised Notes should address the fact that arbitral tribunals might not have the discretion to modify or revisit unilaterally any decision or arrangement which was recorded as an agreement of the parties. It was agreed that the draft revised Notes should address that issue, noting that arbitral tribunals should take caution in relation thereto.

72. A comment was made that the importance of ensuring the efficiency of the arbitral procedure should be reflected in revising paragraphs 10 and 11.

73. It was recalled that paragraph 11 served as a general provision highlighting the importance for arbitral tribunals to consult with parties on questions pertaining to the organization of arbitral proceedings. To clarify that purpose, the Working Group agreed to add a sentence along the following lines: "This is generally the case for most matters addressed in the Notes and therefore normally is treated as a general consideration whenever the arbitral tribunal settles matters of procedure." In that context, the Working Group agreed to consider deleting references to consultations with the arbitral tribunal or with the parties, where appropriate in the text of the draft revised Notes.

74. As a matter of drafting, the Working Group agreed to delete the word "more" before the word "usual" in the first sentence of paragraph 11, and to add at the end of paragraph 11 the words "and the planning of the arbitrators" to alert the parties of the potential impact their decisions could have on the arbitral tribunal.

75. In relation to paragraph 12 of the draft revised Notes, the Working Group agreed to replace the words "the arbitral tribunal may wish to encourage this practice" by wording along the lines of "the arbitral tribunal may wish to give effect to that manner of cost saving". The Working Group agreed that the benefits of holding in-person meetings should also be mentioned as such meetings sometimes also resulted in cost saving.

B. Draft Notes 1 to 6

1. Set of arbitration rules

76. The Working Group agreed that paragraph 14 of the draft revised Notes should be placed before paragraph 13 in order to highlight the benefits of selecting a set of arbitration rules.

77. In relation to paragraph 13, it was suggested that the power of the arbitral tribunal to determine how the proceedings would be conducted should be "based

on", rather than "within the limits" of, the applicable arbitration law. That suggestion did not receive support.

78. It was agreed that paragraph 14 should be revised to better reflect the relation between the various applicable norms. In that context, the Working Group noted that the word "displace" was inappropriate to express the relations between those norms.

79. While a suggestion was made that the draft revised Notes should make reference to other rules or guidelines that might supplement certain sets of arbitration rules (such as those governing emergency arbitrator), it was agreed that reference to general arbitration rules was sufficient. With respect to rules on emergency arbitrator, it was mentioned that the draft revised Notes presupposed that the arbitral tribunal was in place and therefore, reference to such rules would not be relevant.

2. Language or languages of proceedings

80. It was agreed that the last sentence of paragraph 16 of the draft revised Notes should refer to "criteria" to be considered in choosing the language(s) of the proceedings instead of "a common practice".

81. The Working Group considered the last sentence of paragraph 17 of the draft revised Notes, which provided that if more than one language was to be used, the parties might consider whether one of those languages might be designated as being authoritative. It was suggested to clarify that the choice of an authoritative language would be for the purposes of the procedure only.

82. The Working Group further considered whether the example contained in brackets at the end of paragraph 17 should be limited to awards. During that discussion, it was pointed out that the designation of an authoritative language could impact not only the final award but also other procedural aspects, such as procedural orders. In addition, it was suggested that the bracketed text should make reference to situations where there were more than one language version of an award. After discussion, the Working Group agreed that the bracketed text should be expanded to address those points.

83. The Working Group agreed to add text clarifying that while more than one language could be used during the proceedings, procedural decisions as well as awards could be rendered in one of the languages, if so agreed by the parties.

84. It was agreed that paragraphs 17 and 18 of the draft revised Notes should also be addressed to arbitral tribunals in addition to the parties.

85. The Working Group agreed to replace the words "annexed to the statements of claim and defence or submitted later" in the first sentence of paragraph 19 of the draft revised Notes by words along the lines of "on the record".

86. The Working Group agreed to reflect in paragraph 20 of the draft revised Notes that a witness who would be familiar with the language of the proceedings might still require occasional assistance with interpretation.

3. Place of arbitration

87. The Working Group considered the first sentence of paragraph 22 of the draft revised Notes, which stated that some arbitral institutions required arbitrations

conducted pursuant to their rules to take place at the location of the institution. While it was recalled that the 1996 version of the Notes included such text, it did not reflect the current trend whereby institutions generally permitted arbitrations conducted pursuant to their rules to take place at a location which might differ from the place where the institution was located. Despite that general trend, references were made to instances where institutions still required the place of arbitration to be at a specific location (for example, in the field of commodities arbitration and in certain sets of investment arbitration rules).

88. Taking into account the general trend, the Working Group agreed to delete the words "subject to the requirement ... of the institution" in the first sentence of paragraph 22. In support of that decision, it was said that the word "usually" in that sentence sufficiently expressed the fact that there might still be exceptions to that general trend.

89. The Working Group agreed that the words "if it has not already been agreed" at the end of paragraph 22 should be deleted as they were redundant.

90. The Working Group agreed that paragraph 23 of the draft revised Notes should clarify that the place of arbitration would normally determine the applicable arbitration law and indicate the various legal consequence that followed as mentioned in the first sentence of paragraph 23.

91. In relation to paragraph 24 of the draft revised Notes, the Working Group agreed that the words "and other relevant matters" should be added after the words "arbitral procedure" under subsection (iv).

92. It was agreed that reference should be made to the "place" of arbitration instead of "seat" in paragraph 25 of the draft revised Notes and other parts of the draft revised Notes, where applicable.

93. The Working Group considered whether the factors listed in paragraph 25 were factors influencing the choice of the legal place of arbitration or the physical venue of the arbitral proceedings.

94. The Working Group agreed to replace the word "will" by "may" and to delete the word "especially" in paragraph 25. It was also agreed that qualification restrictions in certain States with respect to counsels should be added to the list of factors in paragraph 25.

4. Administrative services that may be needed for the arbitral tribunal to carry out its functions

95. The Working Group agreed that the last sentence of paragraph 30 of the draft revised Notes should clarify that where a secretary was appointed by the arbitral tribunal, the arbitral tribunal ought to disclose that fact to the parties. Therefore, it was agreed that the word "may" in the last sentence of paragraph 30 should be replaced by the words "would normally".

96. The Working Group further agreed that the reference to the "rapporteur" in paragraph 30 of the draft revised Notes should be deleted, as a rapporteur would usually not have the same functions as a secretary.

97. In relation to paragraph 30, attention was drawn to the last sentence of that paragraph, which referred to certain conditions in relation to the appointment of

secretaries including their remuneration. In that context, it was pointed out that certain rules or guidelines that addressed appointment of secretaries provided modalities different from those provided in paragraph 30, for instance, in relation to the permissibility of remuneration. In response, it was pointed out that the last sentence of paragraph 31 sufficiently covered that point.

98. In relation to paragraph 31 of the draft revised Notes, it was said that the functions performed by secretaries were broad in range. It was suggested that paragraph 31 could be restructured to better reflect the different categories of function performed by secretaries, (i) providing purely organizational support, (ii) carrying out more substantive functions (for example, preparation of the facts of the award or the procedural history of the arbitral proceedings in addition to those mentioned in the bracketed text following the second sentence of paragraph 31), and (iii) performing other functions similar to those of the arbitral tribunal. With respect to the last category, the Working Group affirmed that secretaries would normally not be expected to perform decision-making or any other functions that the parties would expect the arbitral tribunal to perform.

99. It was said that the first sentence of paragraph 31 sufficiently described the purely organizational type of functions that secretaries might perform. However, doubts were expressed as to whether such a reference was necessary in the draft revised Notes, as parties to an arbitration would usually not require information about the persons carrying out those functions. In response, it was suggested that information about secretaries that performed those functions should be disclosed to the parties and that those secretaries would also be required to sign a declaration of impartiality, because they might have access to certain information. However, it was generally felt that the draft revised Notes should not provide overly complex guidance and that the matter of confidentiality was dealt separately in the draft revised Notes. It was agreed that the first sentence of paragraph 31 could be retained in its current form.

100. Regarding the more substantive type of functions carried out by the secretaries, a number of suggestions were made. It was generally agreed that information about the secretaries and the functions they performed should be disclosed to the parties, particularly when the functions of those secretaries were broad in scope. A suggestion was made that the words "or overlap" should be deleted from the third sentence of paragraph 31. It was further suggested that the first part of the fourth sentence of paragraph 31 could read along the following lines: "Such a role of the secretary is appropriate only under certain conditions, such as when ...". It was also mentioned that there was no need to retain the words "such role is disclosed" as that point was sufficiently covered by the requirement that parties agree to such role.

101. With respect to the requirement for secretaries to sign a declaration of impartiality as mentioned in the fourth sentence of paragraph 31, it was suggested that secretaries should be required to sign a declaration that would also include independence. Concerns were expressed that requiring a declaration of impartiality could give the wrong impression that those secretaries would indeed be involved in the decision-making process.

102. After discussion, it was agreed that the draft revised Notes should state that the secretaries were expected to be and remain impartial and independent during the

arbitral proceedings and that it would be the responsibility of the arbitral tribunal to ensure this, including by requesting the secretaries to sign a declaration of independence and impartiality. It was also agreed that the draft revised Notes would recognize that there were certain instances whereby secretaries might be required to sign a declaration of independence and impartiality. A concern was raised that such declaration might result in challenges to secretaries.

5. Fees, costs and deposits in respect of costs

103. It was noted that paragraph 32 of the draft revised Notes contained the principle that the costs of the arbitration would normally be borne by the unsuccessful party. It was agreed that paragraph 32 should spell out other possible criteria to apportion costs between the parties, including sharing of costs by parties irrespective of the outcome on the merits or by any other agreement between the parties. It was suggested that the legal environment at the place of arbitration could also be a factor influencing the allocation of costs.

104. Furthermore, it was agreed that paragraph 32 should be broadened to include other elements that the arbitral tribunal would consider in determining the allocation of costs, particularly those mentioned in paragraph 35.

105. In relation to paragraph 34 of the draft revised Notes, it was mentioned that decisions on costs would not have to be linked to the final award on merits and could be made at various stages of the proceedings. With respect to when submission on costs would be required, it was agreed that paragraph 34 should mention that the arbitral tribunal had the discretion to request such submissions, when appropriate. Moreover, it was agreed that paragraph 34 should be revised to take account of situations where arbitral proceedings would be terminated without a final award being rendered. In that respect, it was agreed to delete the words "the possibilities being before or after ... on the merits" in the last sentence of paragraph 34.

106. It was agreed that paragraph 35 of the draft revised Notes should list the factors to be considered by the arbitral tribunal when allocating costs instead of making a reference to guidance or rules of certain arbitral institutions. It was further agreed that those factors should be considered only for the purposes of costs allocation and not as a means of penalizing parties for their behaviour. In that context, it was suggested that the draft revised Notes should indicate that the arbitral tribunal would not normally take into consideration the behaviour of the parties unless it had an actual impact on the costs of the proceedings.

107. In that context, it was agreed that the words "unreasonable", "excessive" and "exaggerated" should be deleted and the examples in paragraph 35 should be presented in a neutral, generic manner (for example, referring to cooperation or non-cooperation of the parties). It was also suggested that "failure to comply with procedural orders" could cause additional costs and therefore, should be taken into account.

108. In relation to the reference to "value-added tax" in paragraph 37 of the draft revised Notes, the Working Group considered whether other types of taxes (for example, income tax) should be mentioned. After discussion, it was agreed that while reference to "value-added tax" could be retained, reference to other types of

taxes would not be added as it would generally complicate the text without providing much guidance.

109. During that discussion, it was suggested that the items listed in the second sentence of paragraph 37 would be better placed in the subsection on fees and costs. Suggestions were made to clarify that deposits could be paid in full or in instalments, and that bank guarantees could be a means to make such deposits.

110. In relation to paragraph 39 of the draft revised Notes, the Working Group agreed to include a provision whereby if an institution did not offer the services of managing deposits, the parties or the arbitral tribunal would have to make the necessary arrangements, for instance with a bank or other external provider. In addition, it was agreed to delete the word "payable" at the end of paragraph 38, and to replace it by the words "on the deposit".

111. Differing views were expressed with regard to the words "international sanctions" in paragraph 39 which would limit the arbitral tribunal's ability to manage payments and deposits. One suggestion was to broaden the wording by adding "restrictions", while another was to delete the reference altogether. Yet another suggestion was that sanctions should be limited to those put in place by international organizations thus excluding sanctions by a State or group of States. After discussion, it was agreed that the words "international sanctions" should be replaced by the words "any restriction on trade or payment".

112. The Working Group agreed that paragraph 40 of the draft revised Notes should be placed after paragraph 37 as it addressed a similar issue.

Interim measures

113. It was agreed that the draft revised Notes should include a separate section on interim measures, possibly before the section on "arrangements for the exchange of written submissions". It was generally felt that the new section should not be prescriptive and need not touch upon the various types of interim measures. It was agreed that that section could address the following aspects: (i) most applicable arbitration rules and arbitration law allowed arbitral tribunals to grant interim measures; (ii) normally an expedited process was provided for interim measures; (iii) enforcement of an interim measure was not always assured; (iv) the arbitral proceedings would continue, even if a party requested an interim measures from a domestic court; and (v) cost and security in connection with interim measures (addressed in the draft revised Notes in paragraph 36).

6. Confidentiality of information relating to arbitration: possible agreement thereon

114. The Working Group agreed that paragraph 43 of the draft revised Notes, which dealt with a situation where the parties had not previously agreed on confidentiality, should read along the following lines: "Should confidentiality be a [concern][priority], parties may wish to agree to record a duty of confidentiality in the form of an agreement." While support was expressed for retaining the words "in consultation with the arbitral tribunal" after the words "wish to agree", it was generally felt that those words were not necessary.

115. It was agreed that paragraph 44 of the draft revised Notes should include a reference to the confidentiality obligations of experts and witnesses.

116. In relation to the second sentence of paragraph 45 of the draft revised Notes, it was suggested that an "arrangement" need not necessarily be made by the arbitral tribunal and could be agreed by the parties themselves. It was also mentioned that such an arrangement would generally restrict access to certain information rather than limit disclosure. To address those concerns, it was agreed that the second sentence of paragraph 45 should be revised to read: "Arrangements may be made by the parties and, in certain circumstances, by the arbitral tribunal in respect of that information, for example, by restricting the access to the information to a limited number of designated persons."

117. A suggestion was made that paragraph 47 of the draft revised Notes should not be placed under the section addressing confidentiality of information in commercial arbitration, as its content dealt with transparency in investment arbitration. Therefore, it was stated that paragraph 47 should form a separate section or subsection. In that context, a suggestion was made that the draft revised Notes should make a clear distinction between commercial and investment arbitration. In response, it was recalled that the general approach of the Working Group had been to not distinguish the different types of arbitration in the draft revised Notes so as to provide general guidance.

118. It was generally felt that paragraph 47 adequately addressed the concerns expressed at the sixty-first session of the Working Group that the matter of transparency as it applied to investment arbitration should be highlighted.

119. After discussion, it was agreed that paragraph 47 should be retained in Note 6, while the heading of that Note could be revised in a manner that also highlighted transparency.

120. With respect to footnote 4 contained in paragraph 47 of the draft revised Notes, it was agreed that reference should only be made to UNCITRAL texts on transparency, and article 1(4) of the UNCITRAL Arbitration Rules (as adopted in 2013), with an indication that there were other rules that also provided for transparency.

121. A suggestion that the draft revised Notes should refer to situations where the arbitration agreement or the underlying contract to the dispute included provisions on confidentiality did not receive support.

C. Draft Notes 7 to 19

122. Before the close of its session, the Working Group heard suggestions with respect to the remaining parts of the draft revised Notes without any deliberation.

Heading of Note 7

123. It was suggested that the word "electronic" be replaced by the word "technological" in the heading of Note 7.

Paragraph 52

124. It was suggested that direct communication between the arbitral tribunal and the parties should be recommended and not merely recognized as a usual practice in paragraph 52.

Paragraph 53

125. It was suggested that paragraph 53 should be revised to include a reference to the procedural timetable that the parties ought to follow.

Paragraph 62

126. It was suggested that paragraph 62 should be revised to reflect more positively the possibility of amicable settlements during arbitral proceedings. It was further suggested that the words "outside the context of the arbitration" in the first sentence and the word "many" in the second sentence should be deleted. It was further suggested that paragraph 62 could provide that where it was possible for the arbitral tribunal to raise the possibility of an amicable settlement, it could, if so requested by the parties, guide or assist the parties in their negotiations. In that connection, a suggestion was made that the words "due caution and restraint" could be deleted.

Paragraph 66

127. It was suggested that reference should be made to applicable law in the last sentence of paragraph 66.

Paragraph 67

128. It was suggested that the word "conclusions" in paragraph 67 should be replaced by the word "inferences".

Paragraph 70

129. It was suggested that paragraph 70 should include a reference to paragraph 56.

Note 13

130. It was suggested that Note 13 should address the consequences of non-appearance of witnesses.

Paragraph 73

131. It was suggested that paragraph 73 should mirror paragraph 81 and include guidance on contacts with the witnesses in the context of written statements.

Paragraph 76

132. It was suggested that paragraph 76 could set out the general practice of the order in which witnesses were examined.

Paragraph 77

133. It was suggested that the last sentence of paragraph 77 should state that when a written statement was submitted, an oral testimony would usually be limited to confirming, summarizing and updating the written statement.

Paragraph 79

134. It was suggested that paragraph 79 should better reflect the diversity in laws and practices with regard to whether a representative of a party could testify as a witness and remain in the hearing room after having testified as a witness.

Paragraph 80

135. It was suggested that a reference should be made to the practice with respect to the order in which witnesses could be heard (for instance, to hear first the witnesses presented by the claimant, followed by those presented by the defendant).

Paragraphs 85 to 95

136. It was suggested that the following could be included in the draft revised Notes: (i) when one or more parties were presenting an expert opinion, it would be advisable for the arbitral tribunal to consult with experts before the preparation of the report; (ii) it would be advisable for the arbitral tribunal to first identify the issues before deciding whether to appoint an expert; (iii) additional information could be provided on the practice of appointing a single joint expert; and (iv) the terms of reference should clearly indicate the expertise required of the expert.

Paragraph 101

137. It was suggested that paragraph 101 was too prescriptive and therefore, should be revised to leave the possibility open for statements made during in-site visits to be treated as evidence in the proceedings.

Paragraph 112

138. It was suggested that paragraph 112 should underline the advisability to consult with the parties on the need for post-hearing submissions. It was also mentioned that arbitral tribunals would usually determine before or during the hearing whether such submissions were necessary.

Paragraph 113

139. It was suggested that paragraph 113 should include the possibility of deliberations taking place before and also "shortly" after the hearings.

Paragraph 115

140. It was stated that while it was true that joinders were more frequent, it would be questionable if that was a result of developments in multiparty transactions. It was also mentioned that not all joinders required the contemporaneous consent of third parties joined as they might already be party to the arbitration agreement.

Additional issues

141. It was suggested that the draft revised Notes could include a provision on the usefulness of including a section on procedural history in the award, particularly to deal with cases where there was a non-participating party.

142. While a suggestion was made that the draft revised Notes should also address circumstances arising after the award, it was generally felt that that was outside the scope of the draft revised Notes.

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I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution relating to cross-border electronic commerce transactions.

2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reaffirmed the mandate of Working Group III relating to cross-border electronic transactions, including B2B and B2C transactions.[1] The Commission decided inter alia at that session that, in general terms, in the implementation of its mandate, the Working Group should also consider specifically the impact of its deliberations on consumer protection and that it should report to the Commission at its forty-fifth session.[2]

3. At its forty-fifth session (New York, 25 June-6 July 2012), the Commission reaffirmed the mandate of the Working Group in respect of low-value, high-volume cross-border electronic transactions, and the Working Group was encouraged to continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, and to continue to conduct its work in the most efficient manner possible.[3] It was further agreed that the Working Group should consider and report back at a future session of the Commission on how the draft rules would respond to the needs of developing countries and those facing post-conflict situations, in particular with regard to the need for an arbitration phase to be part of the process; and that the Working Group should continue to include in its deliberations the effects of online dispute resolution on consumer protection in developing and developed countries and countries in post-conflict situations.[4] The Commission furthermore requested the Working Group to continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, including arbitration and possible alternatives to arbitration.[5]

4. At its forty-sixth[6] and forty-seventh[7] sessions, the Commission affirmed the decisions made at its forty-fifth session.

5. The most recent compilation of historical references regarding the work of the Working Group can be found in document A/CN.9/WG.III/WP.132, paragraphs 5-14.

II. Organization of the session

6. Working Group III (Online Dispute Resolution), which was composed of all States members of the Commission, held its thirty-first session in New York, from 9 to 13 February 2015. The session was attended by representatives of the following States members of the Working Group: Armenia, Brazil, Bulgaria, Canada, China, Colombia, Croatia, Ecuador, France, Germany, Greece, Honduras, Hungary, India,

[1] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 218.

[2] Ibid., para. 218.

[3] Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 79.

[4] Ibid.

[5] Ibid.

[6] Ibid., *Sixty-eighth Session, Supplement No. 17* (A/68/17), para. 222.

[7] Ibid., *Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 140.

Israel, Italy, Japan, Kenya, Mexico, Nigeria, Pakistan, Panama, Paraguay, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, United States of America and Venezuela (Bolivarian Republic of).

7. The session was also attended by observers from the following States: Czech Republic, Egypt, Libya and Netherlands.

8. The session was also attended by observers from the following non-Member States and entities: the Holy See.

9. The session was also attended by observers from the European Union (EU).

10. The session was also attended by observers from the following organizations of the United Nations System: World Intellectual Property Organization (WIPO).

11. The session was also attended by observers from the following non-governmental organizations: American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), Association of the Bar of the City of New York (ABCNY), Center for International Legal Education (Cile), Centre de Recherche en Droit Public (CRDP), Chartered Institute of Arbitrators (CIARB), G.C.C. Commercial Arbitration Centre (GCCAC), Institute of Commercial Law (ICL), Institute of International Commercial Law (IICL), Inter-American Commercial Arbitration Commission (IACAC), Internet Bar Organization (IBO), National Center for Technology and Dispute Resolution (NCTDR), New York State Bar Association (NYSBA), Queen Mary University of London, Centre for Commercial Law Studies.

12. The Working Group elected the following officers:

Chairman: Mr. Jeffrey Wah-Teck CHAN (Singapore)
Rapporteur: Mr. Pradip CHAUDHARY (India)

13. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.III/WP.132);

(b) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (A/CN.9/WG.III/WP.133);

(c) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (Track I) (A/CN.9/WG.III/WP.133/Add.1);

(d) A note by the Secretariat on the proposal by the Governments of Colombia and the United States of America (A/CN.9/WG.III/WP.134).

14. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of online dispute resolution for cross-border electronic transactions: draft procedural rules.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

15. The Working Group resumed its work on agenda item 4 on the basis of notes prepared by the Secretariat (A/CN.9/WG.III/WP.133 and its addendum; A/CN.9/WG.III/WP.134). The Working Group took into account proposals made at the session. The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV.

16. The Working Group continued its strenuous efforts to achieve consensus on the text of the draft Rules, on the basis of various proposals made during the session (see paras. 73 to 100 and 142 to 149). As no consensus was reached, it was said that the Commission should terminate the mandate of the Working Group. It was added that this would be in accordance with the Commission's view that UNCITRAL's scarce resources should be deployed in undertaking legislative development on those topics on which it was likely that consensus could be achieved. Other delegations expressed the view that the Working Group should continue with its efforts to find a consensus on the third proposal. It was noted by these delegations that there were new elements for a consensus that had been identified and that could form the basis of a positive outcome for the Working Group (see, further, paragraphs 156-159 of this Report).

17. The Working Group was also invited to engage in informal consultations before the Commission session in 2015, with a view to enhancing constructive discussion at that session (see, further, paragraph 164 of this Report).

IV. Online dispute resolution for cross-border electronic commerce transactions: draft procedural rules

A. General remarks

18. It was recalled that the Commission had previously expressed concerns about the length of time that some Working Groups had taken to finalize their texts. In this regard, the Working Group recognized the need for progress at this session to resolve critical issues that would enable a set of ODR rules acceptable to all.

19. The attention of the Working Group was drawn to paragraph 94 of the Report of its thirtieth session (A/CN.9/827), in which it was stated that the Working Group would continue its deliberations on the basis of the third proposal as set out in A/CN.9/WG.III/WP.133. It was agreed that this proposal would be the first item for the Working Group to consider, while referring to the other proposals reflected in A/CN.9/WG.III/WP.133 as necessary, and that this item would be followed by the question of private enforcement mechanisms.

20. In this context, it was noted that two States had submitted a proposal on the question of charge-backs for this session (see para. 95 of A/CN.9/827, and A/CN.9/WG.III/WP.134), and the Working Group heard a brief exchange of views on the topic.

21. Examples of private enforcement mechanisms, it was said, already existed in practice. However, it was observed, such mechanisms were in essence discretionary (revocation of a trust mark might not be undertaken following a single claim against

a seller, for example) and were based on contractual mechanisms between the parties (and so would bind only those parties).

22. In this regard, reference was made to the proposal set out in A/CN.9/WG.III/WP.134 which, it was noted, proposed a model law on charge-backs, and so could provide an element of automatic or self-executing outcome. It was also noted that such a determination could be enforced in accordance with the provisions of relevant national law (of which examples existed, as referred to in A/CN.9/WG.III/WP.134). The Working Group agreed to defer further consideration of this item.

The third proposal as set out in A/CN.9/WG.III/WP.133

23. It was recalled that the third proposal provided for a three stage process — negotiation; negotiated settlement facilitated by a neutral; and a final determination, the procedure for which was to be settled on the basis of options provided by the neutral.

24. It was noted that there were three main issues upon which further clarity in the third proposal was needed, as follows:

(a) In the event that the parties were unable to agree on the procedure for the final determination, what the default procedure would be;

(b) What the outcome would be in the event that the parties chose a non-binding recommendation as the final determination;

(c) Whether the process should end in an outcome that was final and binding (and so precluded access to the courts — res judicata).

25. It was emphasized that the term "recommendation" used in this context did not imply a mere suggestion, but one that would or could be implemented by a private enforcement mechanism, such as a charge-back or a trust mark (for a description of these mechanisms, see A/CN.9/WG.III/WP.124). It was suggested that the term "recommendation" might be revisited in due course, so as to reflect more closely the nature of this final determination.

26. The Working Group agreed to devote no more than three days of the current session to its consideration of the third proposal, before turning to the question of private enforcement mechanisms.

27. The proponents of the third proposal stated that revisions to the iteration set out in A/CN.9/WG.III/WP.133 would be submitted to the Working Group later in the session. The proponents confirmed that the main elements of the existing draft would remain, with some amendments and additions (such as referring to a "facilitated mediation" stage), most of which were based on A/CN.9/WG.III/WP.133 and some others on provisions in earlier Working Papers.

28. As regards question (a) in paragraph 24 above, it was noted that the first two options available for the neutral to propose for the final procedure, set out in paragraph 22 of A/CN.9/WG.III/WP.133, would be retained. That is, the final procedure could be non-binding recommendation or arbitration, but there would be no further option that the neutral could recommend (contrary to the existing draft). It was also confirmed that the proposal envisaged that the default procedure would be a non-binding recommendation. Support was expressed for this approach,

recalling that it would also envisage an implementation mechanism as permitted in the jurisdiction concerned.

29. It was stated that there existed many variations of private enforcement mechanisms in practice — an example was given of implementation through consumer associations, though enforcement through judicial procedures would not be envisaged under the proposal. It was noted that only the buyer (and not the seller) could take advantage of a private enforcement mechanism, and it was queried whether such a mechanism could be enforced across borders.

30. It was also queried whether a system with non-binding recommendation as the default procedure was more closely aligned with a B2C than a B2B procedure, and so was in fact intended to address only B2C transactions. It was confirmed that the proposal was not limited to B2C disputes (though it was added that B2B parties could in any event opt in to B2C procedures). It was recalled that both B2B and B2C low-value transactions were included in the mandate of the Working Group. A further alternative could be that the purchaser's choice would determine the final procedure.

31. Other views expressed were that the default mechanism should be for a binding arbitration for both B2B and B2C transactions, to allow for the recognition of binding pre-dispute agreements to arbitrate. Some delegations, in the alternative, suggested that B2B and B2C transactions might be treated differently in this regard. A one-size-fits all solution for both B2B and B2C, it was added, was undesirable. Accordingly, arbitration-based rules could be applied to B2B transactions and recommendation-based rules could be applied to B2C transactions.

32. In addition, it was suggested that whether the proposal would apply to B2C transactions only should be agreed before discussing in detail the final determination procedure.

33. The feasibility of seeking to distinguish between B2B and B2C transactions was considered. Some delegations considered that it would be difficult to do so, especially in the cross-border context, and controversies that had arisen in one jurisdiction in seeking to distinguish between the two types in practice were shared. It was added that seeking to classify transactions would impose additional procedural costs, and might lead to rules that were difficult to implement and to enforce, and that would consequently not prove effective.

34. The Working Group agreed to revisit this issue at a later stage, at which stage it would also consider whether the terms "low-value" and "consumers" needed to be defined.

B. Draft procedural rules

1. Arbitration

Draft article 7, Arbitration (para. 21, A/CN.9/WG.III/WP.133)

35. The following revisions to draft article 7 of the iteration of the third proposal in A/CN.9/WG.III/WP.133 were proposed.

36. Regarding paragraph 1, it was noted that the Rules contemplated that a neutral previously acting as mediator should continue as neutral in the arbitration stage, and

that this final stage of the procedure should be based on the documents previously submitted. It was suggested that the parties should be able to challenge this continuity under the rules, for example through an ability to register any objection by a given deadline. It was recalled that the Working Group had previously considered this issue (see for example A/CN.9/721, paras. 66-67), and had agreed to include in the ODR system safeguards to address the difficulties that the dual role would raise, notably as regards the independence and impartiality of the neutral.

37. In considering this suggestion, it was underscored that the objective was to ensure that any arbitral award would be capable of being enforced through the judicial process, which itself required compliance with due process requirements, including that the parties select the neutral and that the neutral be independent. It was emphasized that these due process requirements arose irrespective of the value of the claim, and that an individual party should not bear the costs of enforcing those rights. Furthermore, the ability to pass these costs on to a party, it was said, might encourage the ODR administrator to design systems that would not keep costs to an appropriate level for all concerned.

38. A second motivation for the suggestion, it was explained, was that the parties might not wish that all communications exchanged with the mediator be taken into consideration in a subsequent arbitration, and would wish to keep control of the documents upon which the neutral would base its decision. On the other hand, the view was expressed that in the typical online transaction, the documentation that a purchaser might not wish to disclose would be negligible.

39. While the suggestion received support, other delegations noted that the Rules were designed for the resolution of low-value claims, and not retaining the neutral and the documents previously submitted might add time and cost to the process. In this regard, it was stated that many arbitral systems around the world retained the neutral throughout equivalent procedures, and that the question of costs and who would bear them were significant. Indeed, it was noted, the cost of a second review of the documents might mean that procedural cost exceeded the amount of the (low-value) claim itself. On the other hand, it was noted that some existing ODR platforms provided a free-of-charge system.

40. Other views were that a neutral previously acting as mediator should in principle not continue as an arbitrator, and any agreement to the continuation of the neutral as an arbitrator should be on the basis of explicit and informed consent, and not through implicit approval. It was suggested that the fact of adopting the Rules at the time of the transaction could constitute explicit approval to the continuation of the neutral as arbitrator and also would constitute an agreement that the documents submitted during earlier stages be used as a basis for the arbitration.

41. In the context of low-value online transactions, it was said that purchasers would generally not read the terms of the dispute resolution clauses at the time of the transaction, and that low-value purchasers would in practice not be able to challenge or change the terms of the transaction and dispute resolution mechanism. In this regard, the terms of article 1, paragraph 1, of the draft Rules were recalled, which provided that the selection of the Rules was undertaken separately from the transaction itself. Once a dispute had arisen, however, the purchaser would be more inclined to review the provisions of the Rules including on the continued appointment of the neutral and on disclosure of documents. In addition, it was

highlighted that the issue would arise only in the type of transaction where the parties would agree to arbitration (whether the transaction concerned might be B2B or B2C).

42. It was also noted that the qualification requirements at the national level might preclude the continuation of a neutral as an arbitrator, and that the Working Group had previously agreed to address the issue of qualifications in guidance to support the Rules. One option would be for that guidance to advise that any neutral appointed for facilitated settlement should be qualified to act as an arbitrator. However, the Working Group was urged not to impose requirements that would inevitably place disproportionate costs on the system overall. Since only a small proportion of cases proceeded to an arbitration stage, requiring all mediators to be qualified arbitrators might indeed impose excessive levels of cost. It was also recalled, in this regard, that the ODR administrator's pricing mechanism would take the varying nature of claims into account.

43. After discussion, the Working Group agreed that the suggestion as formulated in paragraph 36 here above should be included in the next iteration of the Rules.

44. The Working Group then considered the consequences of any such objection raised. It was agreed that those consequences were in part addressed in article 9, but would need to be supplemented. Paragraph 5 of draft article 9 required the appointment of a new neutral, and paragraph 8 contemplated objections to the provision of information without addressing the consequences of such objections being filed. It was agreed that the ODR administrator would assess any objections filed. It was suggested, therefore that paragraph 8 should be supplemented to provide appropriate guidance to the ODR administrator for this purpose, to the effect that certain minimum documents must be provided to the neutral, to include the notice, response and any counterclaim, and the final submissions in the arbitration. In addition, the guidance would note that certain documents — such as those pertaining to negotiations and communications exchanged in the facilitated settlement stage could be excluded.

45. In response to a query about how costs of the system would impact the design of the mechanism, it was confirmed that fees would not be addressed in the Rules, as they would be a matter for the ODR administrator when setting its prices. It was also recalled that the Working Group had previously determined that the Rules would not allow for an award of costs (draft article 18).

46. As regards paragraph 3, it was suggested that the phrase in square brackets "and having regard to the terms of the agreement" should be replaced with the substance of paragraph 8, i.e. "in accordance with the terms of the contract, taking into consideration any relevant facts and circumstances". In consequence, paragraph 8 would be deleted. In support of the suggestion to delete the phrases in square brackets in paragraph 8, it was stated that the phrase "*ex aequo et bono*" was vague, and "any usage of trade applicable to the transaction" would be unlikely to be relevant in the context of low-value claims.

47. Another view was that the references to "*ex aequo et bono*" and "any usage of trade applicable to the transaction" should be retained, notably in the context of parties without equal bargaining power, so that the overall outcome should be fair as between the parties. In addition, while it was acknowledged that it would be rare that this clause would be invoked in small consumer claims; the flexibility to avoid in-depth

interpretations of contractual provisions might be required. It was further suggested that the scope of the issues at stake — generally confined to non-delivery or non-conformity of delivered goods — was such that the scope for ambiguity was limited.

48. A further suggestion was that the term "*ex aequo et bono*" should be expressed in the vernacular, referring to principles of fairness, justice and reasonableness and indicating the nature of the flexibility being conferred to those unfamiliar with the Latin phrase.

49. In this regard, it was agreed that the arbitrator should apply the terms of the contract in the context of the facts and circumstances of the case, and basic principles of fairness and justice or reasonableness. These would include factors such as trade usage. The Secretariat was accordingly requested to provide appropriate language to reflect this approach for the next iteration of the Rules.

50. As regards paragraph 6, it was noted that the goal was to ensure efficiency in the process. Expressing a certain deadline for the award to be rendered, such as 10 days from the deadline for final submissions or from the closing of the hearing, was recommended.

51. In this regard, it was clarified that the reference to "final submissions" was to the "final communications" referred to in draft article 7, paragraph 1, and so the time period would start when the final communications were filed. It was also agreed that the word "preferably" would be deleted from draft article 7, paragraph 6. The Secretariat was accordingly requested to reflect this clarification in the next iteration of the Rules.

52. It was noted that the different language versions of the text should take account of the use of technical terms in different national systems.

53. A query was raised regarding a settlement under the Rules: could the settlement agreement be recorded as an arbitral award capable of enforcement through normal mechanisms? The experience of one system, in which the parties could request a neutral that a settlement agreement be so recorded, was shared. It was noted that recourse to Court enforcement would be unlikely in the context of low-value claims.

54. It was suggested that settlements at all stages in the ODR system could be registered in this way, so as to prevent sham arbitration proceedings being launched merely to seek a consent award. It was emphasized that both parties would also need to agree to such a step.

55. Another view was that this approach could be the outcome only in an arbitration process. In this regard, reference was made to views expressed in an earlier session of the Working Group to similar effect.[8] Settlements from these types of resolution, it was said, might not be capable of enforcement under the New York Convention in any event.

56. After discussion, it was agreed that the parties could request the neutral to register their settlement as an arbitration award, in order to facilitate enforcement only where the settlement was reached in arbitration proceedings. It was agreed that explanation and guidance reflecting the Working Group's conclusions that a

[8] Ref. para. 53. Report A/CN.9/769 (27th session report).

settlement outside arbitration proceedings could not be so registered could be formulated at a later time. Such commentary, it was said, could also include references to private enforcement mechanisms.

Draft article 7 bis, Correction of award (para. 23, A/CN.9/WG.III/WP.133)

57. In response to a query on the short deadlines in this paragraph, it was recalled that all time limits would be considered at the end of the review of the Rules, with a view to ensuring that the entire process was short in the context of low-value claims. It was confirmed that calendar days were generally envisaged under the Rules, rather than working days.

58. It was queried whether the timelines provided for in paragraph 7 bis might raise some confusion on the part of the parties as to how to implement the award "without delay" as required in paragraph 7. It was agreed to revert to this question at a future time.

Draft article 7 ter, Internal review mechanism (para. 24, A/CN.9/WG.III/WP.133)

59. It was recalled that this provision had been introduced to allow the issues set out in the draft article to be addressed, noting that there was no appeals mechanism under the Rules. In response to a suggestion that use of the internal review mechanism should not be required before recourse to the Courts or other forum such as ICSID, it was clarified that the Working Group had previously agreed not to refer to national Courts and systems in the Rules themselves.

60. It was commented that this provision differed from existing arbitral practice that permitted arbitral awards to be set aside on a broader range of grounds through Court procedures, including under the UNCITRAL arbitration texts, and raised many practical issues. It was suggested that adequate protection of the parties would be ensured through those existing mechanisms, and accordingly that article 7 ter should be deleted. In addition, it was suggested that the procedure would serve only to delay the overall procedure, and would not be appropriate in the context of low-value claims. In response, it was suggested that the simple mechanism envisaged in article 7 ter was an innovation designed for the low-value claims environment.

61. The Working Group agreed to delete draft article 7 ter.

2. Neutral

Draft Article 9, Appointment of neutral (para. 26, A/CN.9/WG.III/WP.133)

62. It was proposed that the ODR administrator should not appoint the neutral (but should have a list of neutrals to give to the parties so that they make their choice). It was recalled that this question had been considered previously and the current iteration reflected earlier deliberations in the Working Group. Safeguards were provided in paragraphs 3-7 of article 9, it was noted, which gave the parties a say in the appointment and reflected fairness in the process. Consequently, there was no support for the proposal.

63. It was recalled that the aim of the ability to challenge under paragraph 4(i) was to ensure simplicity and speed in the process, without triggering a review; nonetheless, it was suggested that paragraph 4(i) be deleted. It was also queried

whether, at the arbitration stage, the parties can then raise objections to a neutral previously appointed. In this regard, it was noted that the provisions did not distinguish between the stages of the procedure. Accordingly, it was suggested that a reference to the third possibility to object be added in article 9, paragraph 4, so as to reflect the concerns expressed regarding article 7(1) (that is, when a neutral continues as an arbitrator). The drafting of such a provision was left to the Secretariat, including the procedure for appointment by the ODR administrator in such a situation.

64. It was proposed that wording be added to article 7(1) allowing a party to object to the fact of the neutral in the facilitated settlement stage continuing to be the neutral in the arbitration stage. It was suggested that such a challenge could be added to article 9(4) as a further ground of objection regarding neutrals, with an accompanying reference thereto in article 7(1). The Secretariat was asked to provide the necessary wording changes in the next iteration of the Rules. It was also recalled that an objection could be raised at any stage in the procedure.

65. It was proposed that the provisions under sub-item (i) in paragraph 4 of draft article 9 should be deleted, for two main reasons: in B2C transactions it might favour any merchant that knew the neutrals and in an online environment it could be considered superfluous. An alternative suggestion was that specific grounds for objecting to the appointment of neutral should be required. A further view was that the provisions should be retained, because of their interaction with draft article 9.

66. It was noted that the objectives of the possibility of peremptory challenge under sub-item (i) of paragraph 4 were to avoid lengthy discussion on the appointment and to ensure a swift resolution of any objection made. The Working Group agreed to leave the provision unchanged, again subject to possible further revision at a later time.

67. As regards paragraph 7, it was agreed that the text should be retained, and that the square brackets surrounding the text should be deleted.

68. As regards paragraph 8, it was observed that there were two points during the ODR procedure at which the procedure shifted from one stage to another, but only one shift was addressed in the paragraph as currently drafted (that from negotiations to facilitated settlement). It was suggested that the scope of this paragraph should be expanded to address in addition any shift from facilitated settlement to a final determination. It was added that the paragraph should not imply that the ODR administrator should decide what information is to be provided to the neutral, as this was a matter for either party to decide as regards its own information, and the text should be modified accordingly. The Secretariat was requested to incorporate guidance in these terms in the next iteration of the Rules.

C. Proposal by the Governments of Colombia and the United States of America

69. The Working Group heard a summary of the proposal from the Governments of Colombia and the United States of America, drawing on document A/CN.9/WG.III/WP.134 as regards the proposal itself, and its Annex as regards the existing system in Colombia.

Presentation by the Federal Trade Commission (FTC) to the Working Group on practical experience in operating a chargeback mechanism in the United States

70. Introducing the mechanism, it was said that it was simple, flexible, transparent, free-of-charge for the consumer and user-friendly. The mechanism was described as follows:

(a) An increase in the use of online transactions had followed the introduction of the charge-back mechanism in the United States, accredited to the increased trust that the system afforded. Greater access to SMEs as merchants through their increased visibility in the online marketplace was possible. Other benefits included enhanced standards of customer care for reputational reasons, and that possible instances of fraud or other illicit business practice might be apparent where significant numbers of charge-backs applied to individual merchants;

(b) As regards the process, a consumer would advise of a complaint, which the payment platform would investigate during a period of time specified in the law. During the investigation, the debt would be suspended, and upon determination, either the charge would be reversed (through an automatic mechanism), or the charge-back would be denied (and at that point, the payment would become due). In the latter case, reasons for the denial must be given to the consumer;

(c) The mechanism in the United States covered credit and debit card payments, but could be extended to any virtual payment. It was emphasized that in the United States, all payment providers (a term that was intended to encompass all payment platforms) were obliged to provide the charge-back mechanism, including those operated by third parties;

(d) The OECD had reported that a charge-back mechanism was effective in allowing the liabilities between the parties to be resolved, whether domestic or international. However, each jurisdiction would need to adapt the mechanism to local circumstances. Local law would set out when payments would be deemed to be unauthorized (e.g. non-conformity or non-receipt of goods) or when payment might otherwise be reversed (e.g. where fraud was discovered).

71. In a question-and-answer session:

(a) It was confirmed that the mechanism applied only to consumer purchasers and not to business purchasers, was limited to the value of the goods at issue, and did not address compensation for other harms (e.g. product liability). It was added that a charge-back system would not replace other remedies, including class actions, but that there should be no permissible double recovery through separate action if a payment were reversed; and

(b) Regarding whether a law was needed to enable a charge-back mechanism, in the light of existing international systems operating without legal regulation, it was suggested, in response, that the principal purpose of a law would be to provide minimum guarantees for consumer protection, such as a statutory burden to investigate on the payment provider. It was suggested that the investigatory function of the payment platform could be adapted to the context of the ODR Rules that covered merchant, purchaser and ODR administrator. The Working Group agreed to consider this issue later in the session.

D. Proposal from China

72. The Working Group heard a presentation of a further iteration of the third proposal for the Rules from the delegation of China.

Proposal by China for Draft Procedural Rules based on A/CN.9/WG.III/WP.133

"Draft preamble

73. *"[1. ~~The UNCITRAL online dispute resolution rules (the "Rules") are intended for use in the context of disputes arising out of cross-border low-value transactions conducted by means of electronic communication.~~]*

*[~~2.~~ **1.** The Rules are designed to provide ~~an easy, fast, cost effective~~ **convenient and efficient** procedures for dispute resolution in low-value, high-volume electronic commerce transactions.]*

*[~~3.~~ **2.** The Rules are designed to create a safe, predictable legal environment for transactions, to ensure traders' confidence in the online market.]*

*[~~4.~~ **3.** The Rules are designed to be able to facilitate micro, small and medium-sized enterprises' access to international markets through electronic commerce and mobile electronic commerce.]*

*[~~5.~~ **4.** The Rules are intended for use in conjunction with an online dispute resolution framework that consists of the following documents [which are attached to the Rules as an Appendix.]*

[(a) Guidelines and minimum requirements for online dispute resolution platforms administrators;]

[(b) Guidelines and minimum requirements for neutrals;]

[(c) Substantive legal principles for resolving disputes;]

[(d) Cross-border enforcement mechanism;]

[...]."

Draft procedural rules

1. Introductory rules

74. **Draft article 1 (Scope of application)**

"1(a). The Rules shall apply where the parties to a sales or service contract concluded using electronic communications have, at the time of a transaction, explicitly agreed that disputes relating to that transaction and falling within the scope of the Rules shall be resolved under the Rules.

"1(b). Explicit agreement referred to in paragraph 1 above requires agreement separate and independent from that transaction, and notice in plain language to the buyer that disputes relating to the transaction and falling within the scope of the Rules will be exclusively resolved through ODR proceedings under these Rules (the 'dispute resolution clause').

"2. *These Rules shall only apply to claims*

(a) That goods sold or services rendered were not delivered, not timely delivered, not properly charged or debited, and/or not provided in accordance with the sales or service contract referred to in paragraph 1 (a); or

(b) That full payment was not received for goods or services provided.

[*"3. These Rules shall govern the ODR proceedings except that where any of these Rules is in conflict with a provision of applicable law from which the parties cannot derogate, that provision shall prevail."*]

75. **Draft article 2 (Definitions)**

"[...]"

"6. 'Neutral' means an individual ***or institution*** *that assists the parties in settling or resolving the dispute.*

"[...]"

76. **Draft article 3 (Communications)**

"[...]"

2. Commencement

77. **Draft article 4A (Notice)**

"1. The claimant shall communicate to the ODR administrator a notice in accordance with ***article 4A,*** *paragraph 4,* ***when disputes arise****. ~~[The notice should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.]~~*

"2. The ODR administrator shall promptly notify the respondent that the notice is available at the ODR platform.

"3. ODR proceedings shall be deemed to commence when, following communication ***from the claimant*** *to the ODR administrator of the notice pursuant to* ***article 4A, paragraph 1****, the ODR administrator notifies the parties of the availability of the notice at the ODR platform.*

"4. The notice shall include:

"(a) The name and [designated] electronic address of the claimant and of the claimant's representative (if any) authorized to act for the claimant in the ODR proceedings;

"(b) The name and [designated] electronic address of the respondent and of the respondent's representative (if any) known to the claimant;

"(c) The grounds on which the claim is made ***including all documents and other evidence relied upon by the claimant, or contain references to them****;*

"(d) Any solutions proposed to resolve the dispute;

[*"(e) A statement that the claimant is not currently pursuing other remedies against the respondent with regard to the specific dispute in relation to the transaction in issue.*]

[*"(f) The location of the claimant.*]

"(g) The claimant's preferred language of proceedings;

"(h) The signature or other means of identification and authentication of the claimant and/or the claimant's representative.

[*"5. The claimant may provide, at the time it submits its notice, any other relevant information, including information in support of its claim, and also information in relation to the pursuit of other legal remedies."*]

78. **Draft article 4B (Response)**

"[...]"

79. **[Draft article 4C (Counterclaim)**

"[...]"

3. Negotiation

80. **Draft article 5 (Negotiation)**

Commencement of the negotiation stage

"1. If the response does not include a counterclaim, the negotiation stage shall commence upon communication of the response to the ODR administrator, and notification thereof to the claimant. If the response does include a counterclaim, the negotiation stage shall commence upon communication of the response by the claimant to that counterclaim and notification thereof to the respondent, or after the expiration of the response period set out in article 4C, paragraph 2, whichever is earlier.

"2. The negotiation stage of proceedings shall comprise negotiation between the parties via the ODR platform.

Commencement of the facilitated settlement stage

"~~3. If the respondent does not communicate to the ODR administrator a response to the notice in accordance with the form contained in article 4B, paragraph 3, within the time period set out in article 4B, paragraph 1, or where one or both parties request that the process move to the facilitated settlement stage of proceedings, or a party elects not to engage in the negotiation stage of proceedings, then the facilitated settlement stage of ODR proceedings shall immediately commence~~

*"~~4.~~ **3.** If the parties have not settled their dispute by negotiation within ten (10) calendar days of submission of the commencement of the negotiation stage of proceedings, the facilitated settlement stage of ODR proceedings shall immediately commence.*

Extension of time

*"~~5.~~ **4.** The parties may agree to a one-time extension of the deadline [for the filing of the response] [for reaching settlement]. However no such extension shall be for more than ten (10) calendar days."*

4. Facilitated settlement

81. Draft article 6 (Facilitated settlement)

*"1. **If the respondent does not communicate to the ODR administrator a response to the notice in accordance with the form contained in article 4B, paragraph 3, within the time period set out in article 4B, paragraph 1, or where one or both parties request that the process move to the facilitated settlement stage of proceedings, or either party elects not to engage in the negotiation stage of proceedings, then the facilitated settlement stage of ODR proceedings shall immediately commence**.*

*"~~1~~ **2.** Upon commencement of the facilitated settlement stage of ODR proceedings, the ODR administrator shall promptly appoint a neutral in accordance with article 9 and shall notify the parties (i) of that appointment in accordance with article 9(1)[, and (ii) of the deadline for the expiry of the facilitated settlement stage under paragraph (3)].*

*"~~2~~ **3.** Following appointment, the neutral shall communicate with the parties to attempt to reach a settlement agreement.*

*"~~3~~ **4.** If the parties have not settled their dispute by facilitated settlement within ten (10) calendar days of being notified of the appointment of the neutral pursuant to article 9(1) the ODR proceedings shall move to the final stage of proceedings pursuant to draft **Chapter 4** (Guidance of ODR Administrator)."*

82. Draft article 6 bis

"[...]"

5. Arbitration

83. Draft article 7 (Arbitration)

*"1. **The appointment of neutral responsible for the arbitration by ODR Administrator should conform to the laws of the place of ODR Administrator**.*

*"1 **bis** At the expiry of the facilitated settlement stage, the neutral shall proceed to communicate a date to the parties for any final communications to be made. Such date shall be not later than ten (10) calendar days from the expiry of the facilitated settlement stage.*

"2. Each party shall have the burden of proving the facts relied on to support its claim or defence. The neutral shall have the discretion to reverse such burden of proof where, in exceptional circumstances, the facts so require.

"3. The neutral shall evaluate the dispute based on the information submitted by the parties[, and having regard to the terms of the agreement,] and shall render an award. The ODR administrator shall communicate the award to the parties and the award shall be recorded on the ODR platform.

*"4. The award shall be made in writing and signed by the neutral, and shall indicate the date on which it was made and the place of arbitration. **The place of arbitration means registration place of ODR administrator**.*

"4 bis. The requirement in paragraph 4 for

(a) The award to be in writing shall be met where the information contained in the award is accessible so as to be usable for subsequent reference; and

(b) The award to be signed shall be met where data is used to identify the neutral and to indicate his or her approval of the information contained in the award.

"5. The award shall state brief grounds upon which it is based.

"6. The award shall be rendered promptly, preferably within ten calendar days ~~[from a specified point in proceedings]~~ ***from the date of both parties having received the notice of arbitration****.*

"6 bis. An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.

"7. The award shall be final and binding on the parties. The parties shall carry out the award without delay.

*"8. In all cases, the neutral shall decide [*ex aequo et bono*], in accordance with the terms of the contract, taking into consideration any relevant facts and circumstances[, and shall take into account any usage of trade applicable to the transaction]."*

84. **[*Draft Guidance of ODR Administrator regarding article 7 (proposed as part of the third proposal, A/CN.9/827, para. 72)*]**

"1. If the Neutral has not succeeded in facilitating a settlement at the expiry of the facilitated settlement stage, the ODR administrator shall, on the basis of information submitted by the parties, present to the parties the following options, and ensure that they are aware of the legal consequences of the choice of each track:

(1) Arbitration (as referred to in draft article 7 of Track I);

(2) The Neutral's recommendation (as referred to in Track II)."

"2. If the parties notify the ODR Administrator within 5 calendar days from the expiry of facilitated settlement that they agree to settle the dispute through arbitration provided in paragraph 1 of this Article, the ODR Administrator shall appoint the neutral responsible for the arbitration and communicate the notice of arbitration to the parties within 5 calendar days after receiving the notices from the parties and from that date, the arbitration proceedings provided in Chapter 5 of these Rules shall commence.

"3. If the parties notify the ODR Administrator within 5 calendar days from the expiry of facilitated settlement that they agree to settle the dispute through the recommendation of neutral provided in paragraph 1 of this Article, the ODR Administrator shall appoint the neutral responsible for making the recommendation and communicate the notice of such

appointment to the parties within 5 calendar days after receiving the notices from the parties and from that date, the recommendation proceedings provided in Chapter 6 of these Rules shall commence.

"4. If the parties fail to notify the ODR Administrator within 5 calendar days from the expiry of facilitated settlement that they agree to settle the dispute through one of the two tracks provided in paragraph 1 of this Article, the ODR Administrator shall appoint the neutral responsible for the making the recommendation and communicate the notice of such appointment to the parties within 10 calendar days after the expiry of facilitated settlement, and from that date, the recommendation proceedings provided in Chapter 6 of these Rules shall commence."

85. **[Draft article 7 (bis) Correction of award**

"[...]"

86. **[Draft article 7 (ter) Internal review mechanism**

"[...]"

6. Settlement

87. **Draft article 8 (Settlement)**

"[...]"

7. Neutral

88. **Draft article 9 (Appointment of neutral)**

"[...]"

89. **Draft article 10 (Resignation or replacement of neutral)**

"[...]"

90. **Draft article 11 (Power of the neutral)**

"[...]"

8. General provisions

91. **[Draft article 12 — Deadlines**

"[...]"]

92. **Draft article 13 (Dispute resolution clause)**

"[...]"

93. **Draft article 14 (Place of proceedings)**

"[*The ODR administrator shall select the place of proceedings,* ~~*such place to be selected from among the list set out in the Appendix to [Track 1 of] these Rules*~~ *] in consultation with parties*]"

94. **Draft article 15 (Language of proceedings)**

"[...]"

95. **Draft article 16 (Representation)**

"[...]"

96. **Draft article 17 (Exclusion of liability)**

"[...]"

97. **Draft article 18 (Costs)**

"[...]"

98. **[Draft article 17 (Fees of ODR proceedings)**

"[...]"]

99. **[Annex X/list on designated website**

"[...]"]

100. The following addition was also proposed:

"**Draft article 7 bis. Recommendation by a neutral**

"1. The neutral shall, within fifteen (15) calendar days of the expiry of the facilitated settlement stage, evaluate the dispute based on the information submitted by the parties, and having regard to the terms of the agreement, shall make a recommendation in relation to the resolution of the dispute. The ODR administrator shall communicate that recommendation to the parties and the recommendation shall be recorded on the ODR platform.

"2. The recommendation shall not be binding on the parties unless they otherwise agree."

101. The delegation of China confirmed that the first additional paragraph was based on document A/CN.9/WG.III/WP.130, paragraph 69, item 4.

102. It was noted that the Working Group had not yet come to consensus on the third proposal itself as reflected in A/CN.9/WG.III/WP.133, but had agreed at the end of the last session to continue its deliberations on the basis of that proposal. The Working Group accordingly agreed that earlier decisions during this session as regards the third proposal in A/CN.9/WG.III/WP.133 should be borne in mind, and that further deliberations on some elements of the third proposal set out in A/CN.9/WG.III/WP.133 might be needed.

103. The delegation explained certain of the proposed amendments as follows:

(a) The definition of the neutral should include reference to an institution, so as to reflect those national systems that permitted only institutional, rather than ad hoc arbitration. It was clarified that the term was intended to refer to professional arbitration institutes;

(b) Accordingly, the appointment of the neutral should conform to the laws of the place of the ODR administrator as proposed in new draft article 7, paragraph 1;

(c) The place of arbitration would be important in identifying the applicable law and so should be determined at the outset, and the selection of the location of

the ODR administrator in amended draft article 7, paragraph 4, would reflect the default position in some existing arbitration systems;

(d) The new provisions in paragraphs 2-4 of the guidance to the ODR administrator regarding draft article 7 were without prejudice to the issue of whether the neutral previously appointed would continue as such at the final stage;

(e) That the proposed new draft article 14 would allow the parties' positions to be respected, and ensure independence and impartiality.

104. It was also suggested that draft article 1, paragraph 1, should be amended to narrow the scope of the rules so as to reflect the nature of the transactions intended to be covered by the Rules (and notably cross-border transactions). The Working Group agreed to defer the question to a later time.

105. It was noted that the proposal from the delegation of China suggested amendments to the third proposal as set out in A/CN.9/WG.III/WP.133. The Working Group was invited to comment on the proposal from the delegation of China. Comments on the preamble in that proposal were reserved until the end of this review. A discussion of A/CN.9/WG.III/WP.133 itself, it was noted, would take place at a later date.

106. As regards draft article 2(6), the proposal to include the term "institution" as explained above did not gain support.

107. As regards draft article 4A, the Secretariat was requested to include the proposed additions to items (1) and (3) in the next iteration of the Rules.

108. As regards the provision proposed to be moved from item (1) to item (4), it was noted that the text was proposed to be amended as well as removed. The language in A/CN.9/WG.III/WP.133 ("[The notice should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.]") was facilitative, but that the proposed addition to item (4) was mandatory. In support of the proposal, the importance of full filings was emphasized.

109. It was recalled that the Working Group had previously amended the mandatory provisions to make them facilitative, and had taken into account that the claimants might not be experienced in making such filings. For this reason, draft article 11(3) permitted the neutral to request additional material as needs arose. In the light of these matters, there was no support for these proposed amendments to items (1) and (4).

110. As regards the proposed removal of text from draft article 5 to draft article 6, it was explained that the revisions would better reflect the chronology of events in the proceedings. It was recalled that this provision (originally set out in A/CN.9/WG.III/WP.130) was a bridging provision between two stages of the Rules, and had therefore been included in draft article 5. The Secretariat was requested to place the provision in the most appropriate location in the next iteration of the Rules.

111. As regards the proposed new paragraph 1 in draft article 7, it was recalled that UNCITRAL had deliberated on this issue at many sessions of its Working Group. In support of the proposal, it was explained that under arbitration law in China only awards made by an arbitral institution and not those made by an individual were

provided for, and that this proposed addition was also an application of the proposed change to the definition of the neutral referred to above. In addition, it was suggested, the proposals would ensure that the appropriate applicable law was used.

112. It was also noted that the proposal regarding draft article 7(1) related to the proposed revisions to draft articles 7(4) and 14. It was suggested that the provisions of draft article 14 in A/CN.9/WG.III/WP.133 should remain and the approach set out therein be applied throughout article 7. It was further observed that the proposed amendments to draft articles 7(4) and 14 appeared to contradict each other, and that there should be no difference between the place of arbitration and the place of the proceedings.

113. In addition, it was said that the parties would not be able to derogate from mandatory provisions of law applicable to the ODR process by agreement, including as regards a choice of law determination as might be contemplated in draft article 7. Further, it was noted that a provision relating to choice of law, as draft article 7(1) implicitly contemplated, was unnecessary and, as the Rules had been drafted for simplicity, would undermine the approach.

114. In the light of these matters, there was no support for the proposed additions to draft article 7 (1) and (4).

115. As regards the proposed amendment to draft article 7(6), it was observed that the proposed time frame was short, and appeared to contradict the provisions of draft article 7(1) bis, which itself allowed 10 days for the filing of final communications. It was also recalled that time periods would be considered at a later time (see, further, paragraph 57 above).

116. In response, it was observed that this iteration of the third proposal had built in a time period for issue of a notice of arbitration in the proposed guidance for the ODR administrator (see paragraph 84 (1), item (1) above). The need for a swift determination for the appropriate operation of the websites concerned was emphasized.

117. A further view expressed was that the proposals appeared to separate the process into two distinct stages, contrary to the provisions of draft article 7(1) bis, which contemplated an automatic transition to the final determination procedure. It was also recalled that, earlier in the session, the Working Group had decided that (a) the provisions provide for a deadline to be expressed as a defined period after the final communications were filed and (b) the word "preferably" be deleted. The Working Group maintained its earlier decision.

118. As regards the proposed draft guidance of the ODR administrator in paragraph 84 above, it was observed that the proposal was intended to operate to provide a default option in favour of a non-binding recommendation under the Rules, unless a second decision to arbitrate at the final stage were made after the dispute had arisen (a "second click").

119. In addition, it was noted that the proposal provided that the ODR administrator would appoint a neutral to make a non-binding recommendation if the parties were unable to agree on the final determination procedure.

120. Earlier discussions in the session regarding whether the term "recommendation" should be retained were recalled. The Working Group was requested to consider possible alternative terms.

121. Interventions at earlier sessions of the Working Group to the effect that many States permitted binding pre-dispute agreements to arbitrate were also recalled, and that B2B transactions with pre-dispute binding agreements to arbitrate had been recognized for many decades. It was also suggested that in a number of jurisdictions, pre-dispute binding agreements to arbitrate for both B2B and B2C transactions must be recognized, as a requirement among other things of the New York Convention. In this regard, it was also recalled that the proponents of the third proposal had earlier confirmed to the Working Group that it was not intended to override mandatory provisions of applicable national law.

122. It was also queried whether the draft proposal was intended to apply to both B2B and B2C transactions, recalling in this regard that there was no national prohibition of binding pre-dispute agreements to arbitrate in the B2B context. In response, the proponents stated that the question should be settled by consensus of the Working Group. The proponents added that there would be concerns about how to create an effective mechanism to distinguish B2B and B2C transactions. Another view was that a definition of a consumer could be contemplated.

123. It was suggested that the scope of the draft Rules could be amended to exclude B2B cases in which there was a pre-dispute agreement to arbitrate. Thus, it was suggested, B2B cases without such prior agreement, and B2C cases, would then fall within the scope of the Rules (and the mandate of the Working Group to cover both B2B and B2C cases would be respected). This approach would, it was said, not interfere with prohibitions of binding pre-dispute agreements to arbitrate so far as consumers were concerned. An alternative approach was that separate Rules for B2B and B2C cases could be contemplated. However, the objections of some delegations to such an approach were recalled.

124. On the other hand, it was queried whether the third proposal would in fact permit pre-dispute agreements to arbitrate, as such a feature did not appear in this iteration of the text of the Rules.

125. It was also explained that the proposed guidance for the ODR administrator in paragraph 84 above was the core of the third proposal, and that it was designed to reflect the parties' agreement. Accordingly, it was confirmed that without a pre-dispute agreement to arbitrate, there could be no move to arbitration without a second click.

126. Another view was that the proposal reflected contractual arrangements and such would not interfere with arbitration regulations recognizing pre-dispute agreements to arbitrate, as such regulations would respect party autonomy in such matters.

127. Reference was also made to the flow chart contained in paragraph 72 of the Working Group's Report into its thirtieth session (A/CN.9/827), in which the chronology underlying the proposal was set out. Consequently, it was suggested, the provisions in the draft Guidance should be located prior to the provisions in draft article 7 (Arbitration).

128. A further query was raised regarding how the provisions referring to notices to be issued by the neutral in items 2-4 would operate in practice. In response, it was explained that, after the expiry of the facilitated settlement stage, the parties would notify the ODR administrator of their intentions for the final determination procedure, which would enable the neutral to issue the notices concerned. A further query was why a neutral would need to be appointed separately at the final determination stage, as the Rules elsewhere contemplated an appointment continuing after the facilitated settlement stage unless an objection to such continuation was raised.

129. It was recalled that the aim of the third proposal was to support the rapidly rising amount of e-commerce and the consequent need for cross-border ODR procedures that reflected international practice in this field. In this regard, the experience of China in this field through consumer protection associations and in international commercial arbitration was shared. It was noted that recent experience in ODR in China had generally not included arbitration as a forum to resolve disputes, which might be explained by the fact that arbitration and the enforcement of arbitral awards involved strict procedures. These procedures, it was added, were not suitable for low-value cases especially those involving consumers and MSMEs. In addition, it was said, the costs of traditional arbitration procedure were high and small cases might not be of interest to existing arbitral institutions.

130. It was emphasized that the proposal was not intended to affect the validity of any agreements between the parties (and, as the Rules expressly provided, they would not affect any provision of law from which the parties could not derogate), matters that the ODR administrator — when providing appropriate guidance — would take into account. Thus valid pre-dispute agreements to arbitrate would be determined according to applicable laws. It was said that the Rules themselves would not expressly provide that the parties could agree, pre-dispute, to arbitration.

131. It was therefore suggested that the scope of application of the Rules could be adjusted to exclude B2B cases where there was a pre-dispute agreement to arbitrate, which would mean that (a) all consumer cases fell under the ODR Rules and (b) B2B cases without such an agreement would also fall under the Rules.

132. One view of the third proposal was that the existence of options at the expiry of the facilitated settlement stage logically excluded a pre-dispute agreement to arbitrate. As the Rules did not distinguish between B2B and B2C transactions, a "second click" would be required in any event.

133. Another view was that parties that had concluded a pre-dispute agreement to arbitrate would ipso facto have excluded the operation of the Rules.

134. A further view was that the third proposal would in fact permit valid pre-dispute agreements to arbitrate in both B2C and B2B cases.

135. It was queried, in that regard, how a dispute resolution clause in the original transaction that stipulated the Rules as an ODR mechanism and arbitration as the final determination procedure would be construed. There might be a risk of contradictory clauses, it was said. One interpretation postulated was that as the Rules were contained in a dispute resolution clause that was separate from the transaction, it could be presumed that such a separate dispute resolution clause would override any conflicting provision in the transaction contract.

136. Another view of the proposal was that a valid pre-dispute resolution clause providing for arbitration would be given effect under the Rules, whether in a B2B or B2C case.

137. It was stated that the Rules would not be useable in practice without a clear understanding of their scope and application. Another view was that dispute resolution clauses were interpreted differently in different jurisdictions, and local guidance to reflect local law and regulations would be needed. Accordingly, it was said, some element of ambiguity should not prevent consensus on the provisions of the Rules. The proponents of the third proposal, on the other hand, stated that the Rules combined with applicable laws (including consumer protection and arbitration laws) would ensure a predictable result and in an efficient system appropriate for the e-commerce environment.

138. It was recalled that the main outstanding issue arose in that, in a significant number of jurisdictions, pre-dispute agreements to arbitrate were not enforceable so far as consumers were concerned. The Rules should not address considerations of the validity of such agreements themselves, it was said, and that there were two options available to the Working Group to avoid so doing.

139. One option, it was stated, would be to adjust the Rules to this consumer standard, and construe the Rules accordingly (as one of the interpretations above made clear). If the parties then chose a post-dispute agreement to arbitrate, that would be a valid agreement. A second option would be to separate the B2C cases in these jurisdictions or generally from B2B cases, as compromise proposals had sought to do.

140. It was added that the difficulties in accommodating B2B and B2C cases meant that a third option was to simplify the mechanism so that it could be adapted for all situations. Purchasers would understand that if there were a dispute, the first step would be to try to negotiate a solution; any second stage would involve assistance in to facilitate settlement, and any third step would involve a procedurally more complex procedure (whether that procedure was recommendation or arbitration). The costs of each transaction should be de minimis, it was added. As regards the procedures themselves, the parties should disclose all relevant information to allow the neutral to decide the issues at hand and no more.

141. The European Union presented a further proposal.

E. Proposal by the European Union regarding the implementation of the third proposal (the "second click proposal")

142. **Model dispute resolution clause**

Disputes arising out of the contract [*description of the contract*] and falling within the scope of the UNCITRAL ODR Rules and relating to the following claims:

(a) That goods sold or services rendered were not delivered, not timely delivered, not properly charged or debited, and/or not provided in conformity with the contract; or

(b) That full payment was not received for goods or services provided shall be resolved through ODR proceedings in accordance with the UNCITRAL ODR Rules.

The ODR administrator shall be [*name, business address (location) and electronic address of the responsible ODR administrator*]. Communications in the course of the ODR proceedings shall be communicated via the ODR platform [*name and electronic address of the ODR platform and indication of the name and location of the entity responsible for the platform*].

The place of ODR proceedings shall be [*indication of the place and/or indication on how this place is determined*].

Possible additional paragraph:

The language of proceedings shall be [*indication of language(s) in accordance with article pertaining to language in the ODR Rules*].

143. **Draft article 1 (Scope of application), paragraph 1 bis**

Explicit agreement referred to in paragraph 1 requires agreement separate and independent from that transaction, and notice in plain language that disputes relating to the transaction and falling within the scope of the Rules will be resolved through ODR proceedings under the Rules [~~and whether Track I or Track II of the Rules apply to that dispute~~] *(the "dispute resolution clause").*

144. **Draft article 6 (Facilitated settlement), paragraph 3**

If the parties have not settled their dispute by facilitated settlement within ten (10) calendar days of being notified of the appointment of the neutral pursuant to article 9(1) (the "expiry of the facilitated settlement stage"), the final stage of proceedings shall ~~*commence*~~ *be conducted pursuant to article 7A~~7~~ (Recommendation by a neutral), unless the parties explicitly agree, following guidance of the ODR Administrator in accordance with draft Article 6A, that the final stage of proceedings shall be conducted pursuant to article 7B (Arbitration).*

145. **Draft Article 6A (Guidance of the ODR Administrator)**

The ODR administrator shall inform the parties of the legal consequences of the proceedings pursuant to article 7A and article 7B.

146. **Comment**

The guidelines for ODR Administrators will contain standard information on the different legal consequences, in particular that proceedings under Article 7B lead to a procedural outcome that produces res judicata effect and hence blocks the parties' access to the courts, whereas the proceedings under Article 7A lead to a procedural outcome that does not produce res judicata effect and therefore does not block the parties' access to the courts.

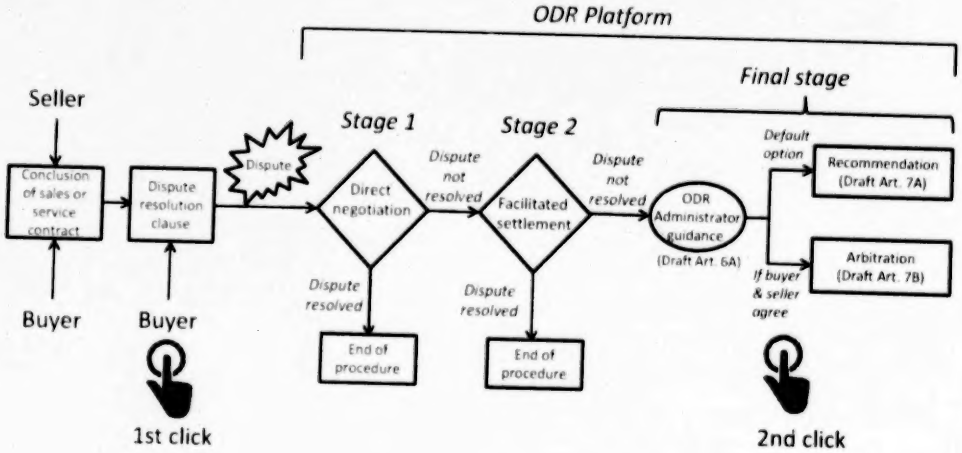
147. **Draft Article 7A (Recommendation by a neutral)**

(cf. draft Article 7 of Track II, WP.130)

148. **Draft Article 7B (Arbitration)**

(cf. draft Article 7 of Track I, WP.133)

149. **Diagram**



150. It was underscored that the third proposal would be supported by certain delegations if interpreted in accordance with the approach set out in this latest proposal, of which an integral element was a post-dispute agreement regarding the final determination stage.

151. It was observed that the European Union proposal was therefore very similar to the third proposal, and that it sought to clarify some aspects of the third proposal. The main difference between the two proposals, it was noted, was that the European Union proposal was based on the current text of Track II (set out in A/CN.9/WG.III/WP.130) and was less detailed in the practical application of the "second click".

152. Reference was made to the diagram at paragraph 149, and it was queried whether the European Union proposal was in conformity with the third proposal in that a "second click" was required. In response, the proponents of the third proposal confirmed that the diagram correctly clarified the third proposal in this regard. It was further queried whether this would be the case even if there were a pre-dispute agreement to arbitrate. In response, it was stated that the third proposal did not affect the validity of the pre-dispute agreement to arbitrate, which would be determined by applicable law.

153. In light of the above, it was suggested that other approaches might need to be considered, or indeed whether it might be the case that there was no workable solution to the issue. Options could include separating B2B and B2C cases, or confining the Rules to B2C cases, which would require the Working Group to request the Commission to modify the mandate; another would be to leave the language of the third proposal as currently drafted, allowing users to interpret the provisions as they saw fit; another option would be to have different Rules for online arbitration, which would indicate that consultations with UNCITRAL's Working Group II would be appropriate.

154. In addition, the following observations were made:

(a) That the Working Group had progressed on from the two-track system to consider the third proposal;

(b) Confining the Rules to B2C cases might not be commensurate with the overall scope of UNCITRAL's work, but that this would be an issue for the Commission, which had already considered the question and resolved it by referring to low-value claims; and

(c) The different interpretations of the *Draft Guidance of ODR Arbitrator regarding article 7* as set out in the Proposal from China (paragraph 84 above), meant that the third proposal as it stood would not provide a solution as it would not lead to certainty on a crucial point of the Rules.

155. Following the above comments, reference was made to the statement in paragraph 15 of the Working Group's thirtieth session (A/CN.9/827), in which it was noted that there were fundamental differences relating to the validity of pre-dispute agreements to arbitrate. It was stated that the above discussion demonstrated that those differences remained. Consequently, it was said, despite strenuous efforts of the Working Group and the various constructive proposals submitted, it did not appear that consensus could be achieved. In addition, a decision of the Commission in 2013 was recalled, concerning the importance of taking a strategic approach to the allocation of UNCITRAL's scarce resources and of undertaking legislative development on those topics on which it was likely that consensus could be achieved (A/68/17, paras. 294 and 297). It was therefore suggested that the Working Group should recommend to the Commission that the mandate of the Working Group to work on the Rules be terminated.

156. The enormous efforts of the Working Group to come to consensus were underscored, and it was added that the deliberations in the Working Group had nonetheless been important in furthering the development of ODR, whose value for the development of electronic commerce worldwide was again emphasized.

157. An alternative view was that the third proposal could lead to consensus; that consensus was appearing to be closer, and work on the third proposal should continue. In this regard, it was recalled that the third proposal had been based on attempts to find a simple, effective and efficient solution that would lead to universally-acceptable ODR Rules. Its proponents acknowledged, however, that there were different interpretations of the proposal, but they agreed that attempts to seek consensus should continue.

158. A further suggestion was that those attempts should continue with appropriate limitations on the scope of the Rules. It was added that the breadth of the types of transactions and jurisdictions to be accommodated was such that greater clarity from the Commission would be helpful as regards whether low-value claims and what might be a broader group of business claims should both be accommodated.

159. It was noted that issues of scope would need to be considered by the Commission and that the third proposal remained to be considered by the Working Group. The Working Group was therefore invited to consider the modifications to the third proposal made earlier in the session, with a view to concluding its deliberations on the proposal. In this context, the importance of the topic of ODR to the growth of e-commerce was again emphasized.

F. Private enforcement mechanisms

160. The Working Group deferred its consideration of the proposal contained in A/CN.9/WG.III/WP.134. The Working Group considered, however, the question of private enforcement measures more generally. It was recalled that these measures were intended to give effect to the neutral's recommendation, and observed that they might also be relevant for any arbitral award under the Rules (noting that, in the context of a low value claim, enforcement might not be sought through judicial enforcement).

161. An initial issue was whether the term "recommendation" should be maintained. It was agreed that clarity in the meaning of this description of the outcome of this final stage of the proceedings was vital, and that a definition of the term would be required to include both that the outcome would not have res judicata effect and that it would be capable of implementation through the use of applicable enforcement mechanisms. It was added that the term should not be defined in a way that was contrary to its normal understanding, to avoid confusion.

162. Alternative suggested terms included "direction", "decision", "adjudication" or "determination". Comments on these alternative terms included that the term "recommendation" might have connotations of an option rather than a final or conclusive determination; that some of the other terms might have legal connotations that made them less accessible to lay parties. Another view was that the term "recommendation" itself might lead to confusion among those who were not lawyers.

163. The history of the Working Group's deliberations when selecting the term "recommendation" was also recalled. Arguments were made to the effect that the term should be a robust one, so as to convey the impression that the final outcome was not one that the parties were free to accept or reject. After further discussion, there was no consensus to change the term "recommendation" and the Secretariat was instructed to consider providing for the definition of this item in the next iteration of the Rules.

V. Intersessional consultations

164. There was support for a suggestion that a smaller group of States, in which any participant in the Working Group might take part, could be constituted to seek to agree a way forward on outstanding issues. The Secretariat offered to facilitate such interaction, with a view to enhancing constructive discussion at the Commission session, and would operate in as transparent a manner as practicable, with due respect for all official United Nations languages to the extent possible.